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THE  
PRACTICE  
OF THE  
Court of King's Bench  
IN PERSONAL ACTIONS.  
VOL. I.

By WILLIAM TIDD, Esq.  
' OF THE INNER TEMPLE.

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CORRECTED AND ENLARGED.

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TO  
THE HONORABLE  
THOMAS ERSKINE,

THIS WORK IS DEDICATED,

WITH  
THE HIGHEST RESPECT  
FOR THOSE GREAT TALENTS,

AND  
THAT UNIFORM INTEGRITY OF CONDUCT,  
WHICH HAVE RENDERED HIM  
SO DISTINGUISHED AN ORNAMENT  
OF THE ENGLISH BAR.



## P R E F A C E.

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**B**Y way of introduction to the following work, it may not be improper to give some account of the jurisdiction of the Court of King's Bench in personal actions; and to take a view of the proceedings in such actions, and the practice by which they are regulated, from the commencement of the suit to the obtaining of final judgment and execution.

This court has a direct and immediate jurisdiction by bill, in actions for trespasses *vi et armis*, committed in *Middlesex*, or other county where the court sits. It has also an incidental jurisdiction by bill, in all personal actions brought against *prisoners* in the actual custody of the marshal, or persons who have put in bail upon a *cepi corpus* or *habeas corpus*, and who are still for this purpose supposed to be in custody. On these grounds, the court by a fiction is enabled to hold plea by bill, in all personal actions whatever; for it is only feigning a complaint of trespass, over which the court has an inherent jurisdiction, and when the defendant is brought

in on such complaint, the plaintiff is allowed to waive or abandon it, and to exhibit his bill and declare against him as a prisoner, for any other species of injury. This court has also a jurisdiction in all personal actions, brought by or against its *attornies* and officers, who are entitled to sue therein by attachment of privilege, and must be sued by bill<sup>a</sup>. And it has by degrees acquired a jurisdiction, which it exercises by original-writ, in all personal actions, brought against any person not privileged as an attorney or officer, or being a prisoner in the actual custody of the marshal.

From what has been said it may be collected, that the different modes of commencing an action in this court, are first, by *bill* in trespass, or against prisoners, attornies or officers; secondly, by *attachment of privilege*, at the suit of attornies or officers; and thirdly, by *original-writ*. It has been doubted, whether a *peer* of the realm can be sued in this court by bill; and the better opinion seems to be that he cannot, but that he ought to be proceeded against by original-writ<sup>b</sup>: And this is the only method of proceed-

<sup>a</sup> For an account of the exercises in civil actions by jurisdiction in general of the bill, see Sul. Lect. 32. p. 300. Court of King's Bench, and &c.

of that in-particular which it <sup>b</sup> 2 H. Blac. 267. 299.



ing against a *corporation*, or *bundredors* on the statutes of hue and cry, &c. or where by reason of the defendant's being abroad, or keeping out of the way, he cannot be arrested or served with process.

The general proceedings in an action in this court are first, the *process*\*, to bring the defendant into court; secondly, his *appearance* and *bail*; thirdly, the *pleadings*, beginning with the declaration; fourthly, the *issue*; fifthly, the *trial*, or determination of the issue; sixthly, the *judgment*; and seventhly, the *execution*: To which may be added, the proceedings in *scire-facias* to revive the judgment, or in *error* to reverse it; though these are rather to be considered as distinct actions, growing out of, than as parts of the original suit. The above proceedings are from time to time entered on the rolls of the court, which thence take their denomination of the *process-roll*, the *appearance* or *recognizance-roll*, the *plea* or *issue-roll*, the *nisi-prius-roll*, and the *judgment-roll*, on which latter is entered the award of execution.

\* In actions against *attorn-* it is but seldom sued out, *nies*, who are supposed to be where judgment is entered on constantly present in court, a warrant of attorney, or the or against *prisoners*, who are parties proceed to trial on a already in custody of the marshal, there is no *process*; and feigned issue.

Besides these general proceedings, there are others of a more particular nature, which occur in the course of a suit; such as, in bailable actions, the arrest and bail-bond, with the proceedings thereon, or against the sheriff, to compel him to return the writ, or bring in the body. These happen before the plaintiff has declared absolutely. After declaration and before plea, the defendant, in order to prepare for his defence, is under circumstances allowed to craveoyer of deeds, &c. or copies of written instruments, call for the particulars of the plaintiff's demand, or claim inspection of public books, court-rolls, &c. or he may move the court to change the venue, consolidate actions, strike out superfluous counts, or bring money into court. After issue and before trial, the plaintiff should give notice of trial, sue out the jury-process, and make up and pass the record of *nisi prius*; and each party should prepare a brief for counsel, and *subpoena* his witnesses. And after trial and before judgment, the unsuccessful party may move the court for a new trial, or in arrest of judgment, or for judgment *non obstante veredicto*, a repleader, or *venire facias de novo*.

The varieties in the proceedings are occasioned, first, by the nature of the action, and mode of its commencement, as whether it be

founded in tort or contract, or be commenced by bill, attachment of privilege, or original-writ: Secondly, by the character of the parties, or description of persons by or against whom the action is brought, as whether it be brought by or against privileged persons, such as attornies or officers of the court, peers or members of the house of commons, corporations or hundredors; or in the case of unprivileged persons, whether it be brought by one or more plaintiffs, or against one or more defendants; by the assignees of a bankrupt or insolvent-debtor, or against the bankrupt or insolvent-debtor himself; by paupers, or against bail, seamen or soldiers, justices of the peace, constables, parish-officers, or officers of the excise or customs; or by or against infants, baron and feme, surviving partners, executors or administrators, heirs or tertenants, &c. Thirdly, by the course which the proceedings take, and whether the action goes on, or abates by the death of the parties; or the plaintiff voluntarily abandons it, by a discontinuance, *nolle prosequi*, or *cassetur billa vel breve*, or makes default, and suffers judgment of *non pros* for not declaring, replying, or entering the issue, or judgment as in case of a nonsuit for not proceeding to trial; or the defendant compromises or compounds

pounds the action, confesses it, or lets judgment go by default.

If the action be litigated, the course which the proceedings take is determined principally by one or other of the following circumstances; first, by the mode of *defence* adopted by the defendant, as whether he plead or demur, and if he plead, whether it be to the jurisdiction of the court, in abatement, or in bar, and if the latter, whether he plead one or more pleas, and if only one, whether it be the general-issue or a special plea; secondly, by the subsequent pleadings, and nature of the *issue* joined upon them, as whether it be an issue in fact or in law, and if in fact, whether it be triable by the court upon *nisi record*, or by a jury, upon pleadings concluding to the country; thirdly, by the mode of *trial*, and the proceedings in the course of it, as whether the trial be at bar or *nisi prius*, or by a common or special jury, or the defendant at the trial plead *puts darrein continuance*, or the parties agree to withdraw a juror, or refer the cause to arbitration, or there be a nonsuit or verdict, and if a verdict, whether it be general or special, or there be a special case, bill of exceptions, or demurrer to evidence; fifthly, by the nature of the *judgment*, which is either for the plaintiff or defendant,



defendant, for the former by confession or *nihil dicit*, for the latter on a *non pros*, discontinuance, *retraxit*, *nolle prosequi*, or nonsuit, and for either party upon demurrer, *nul tiel record*, or verdict; sixthly, by the species of *execution*, as whether it be by *fieri facias* against the defendant's goods, by *elegit* against his goods and a moiety of his lands, by *capias ad satisfaciendum* against his person, or by *extendi facias* or *extent*, against the whole of his lands, or in some cases against his body, lands and goods.

The practice of the court, by which the proceedings in an action are governed, is founded on ancient and immemorial usage, regulated from time to time by rules and orders, acts of parliament, and judicial decisions. The practice is the law of the court, and as such is a part of the law of the land<sup>a</sup>; and it has been so strictly adhered to, that in the case of *Bewdley*<sup>b</sup>, a practice of seven years only was allowed to prevail against the express words of an act of parliament<sup>c</sup>. The rules and orders of the court are either such as are made for the regulation of its general practice, or such as apply only

<sup>a</sup> Jenk. Cent. 295. 2 Co. 1 P. Wms. 207, 223.  
 17. 4 Co. 93. (b). Hard. 98. <sup>c</sup> 2 Str. 735. and see 3 Bur.  
 2 Sess. Caf. 342. 1 Will. 162. 1755. *Sed quare* P  
 4 Bur. 2572.



to the proceedings in a particular cause. The general rules are confined in their operation to the court in which they are made; and for the most part respect the mode of conducting the proceedings. Hence we find, that acts of parliament are frequently necessary, to introduce regulations extending to all the courts, or creating some change or alteration in the proceedings themselves. And as questions arise respecting the regularity of the proceedings, the court are called upon to settle, by judicial decisions, the course of their own practice, or to fix the construction of the rules or acts of parliament which have been made respecting it.

Such is the nature of practice; upon which it is observable, that as the actions and general proceedings are the same, in all the superior courts of common law, there must necessarily be a great uniformity in the practice of each; and especially when it is considered, that the courts have in many instances adopted the same general rules, and are governed by the same acts of parliament, in the construction of which their decisions must of course be similar.

In the following work, the Author has considered the proceedings, in the order in which they present themselves, and follow one another

other in the course of the suit; and has endeavoured to explain, not only the proceedings in general, but also such as are of a more particular nature, with all the varieties attendant on each, whether occasioned by the nature of the action, the character or description of the parties, or the course of the proceedings. As the practice cannot be properly understood, without a previous knowledge of the *actions* to which it relates, the Author has, in the outset of the work, formed an analysis of personal actions, and shewn the time limited for their commencement, and in what cases a previous notice or demand is necessary to support them. In stating the mode of commencing the suit, he has attended to the jurisdiction of the court, as it is exercised by bill, by attachment of privilege, or by original-writ. The proceedings against *prisoners*, including the practice on *habeas corpus*, and against *attornies* and officers of the court, are classed under the head of proceedings by *bill*; and the proceedings against *peers* of the realm, *corporations* and *hundredors*, under that of proceedings by *original-writ*; to which *outlawry* is considered as an incident. The doctrine of *pleas* and *pleadings*, and of demurrers, amendments and joinders, is considered, with reference

ference to the different actions, so far as appeared to be necessary for understanding the practice of the court: And the reader will here find some account of the practice on *motions*, and the cases in which the court will set aside or stay the proceedings, the subject of *arbitration*, and the law of *damages* and *costs*, with the proceedings in *scire facias* and *error*. The proceedings in *criminal* cases in general, and in *real* and *mixed* actions, being foreign to the purpose of this work, are only incidentally mentioned in the course of it: The doctrine of *attachments* however is considered, as it arises out of, and is connected with the proceedings in civil suits.

In the present edition, many alterations have been made. The mode of proceeding by *bill* in trespass, if not the most ancient, being that which is most commonly used, is now treated of, as well as the proceedings by bill against prisoners and attornies, before the mode of proceeding by *original-writ*. Other parts of the work have been considerably enlarged, and particularly those which treat of *actions* and *declarations*; of the doctrine of *arrest*; of the proceedings against the *sheriff*, to compel him to return the writ and bring in the body; of *attornies*, and the mode of their admission, with their duties, privileges and

and disabilities; of the practice on *motions*, and the judgment and execution against *beirs* and *tertenants*, &c. The whole has been carefully revised, and such corrections made as appeared to be necessary; and all the cases which have been determined since the publication of the former edition, are incorporated in the present, together with several new rules of court, and modern acts of parliament. A copious analytical index is subjoined, shewing at one view the connection and order of the different proceedings.

For any fault in the plan or arrangement of the work, the Author is solely accountable. For the materials of which it is composed, he has constantly had recourse to the acts of parliament, rules of court, and adjudged cases; the substance of which he has endeavoured to give with accuracy. The manuscript cases referred to in the first edition, he was favoured with by Mr. *Serjeant Runnington*; and those in the present, by Mr. *Abbot*, the clerk of the rules, to whom he is indebted for much useful information, respecting the rules and orders of the court. And in preparing the present edition for the press, he has derived great assistance from  
Mr.

Mr. *Setb Thompson* ; a gentleman whose private worth has gained him the esteem of his friends, and whose abilities as a pleader must insure him success in his professional pursuits.

TEMPLE,  
*May 15, 1799.*

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CHAP. I.  
OF ACTIONS,

AND  
THE TIME LIMITED FOR THEIR COMMENCE-  
MENT, &c.

ACTIONS are commonly divided into *criminal*, or such as concern pleas of the crown, and *civil*, or such as concern common pleas\*. And these latter are again divided into *real*, *personal*, and *mixed* actions. In a *real* action, the proceedings are *in rem*, for the recovery of real property only; in a *personal* action, they are *in personam*, for the recovery of specific chattels, or of some pecuniary satisfaction or recompence; and in a *mixed* action, they are *in rem et personam*, for the recovery of real property, and damages for withholding it. In the following work, it is the author's intention to treat of *personal* actions, and the various

\* Co. Lit. 284. b. Cowp. 391.

means of commencing, prosecuting, and defending them, in the court of King's Bench, by a methodical arrangement of the several acts of parliament, rules of court, and judicial decisions upon the subject.

*Personal* actions are *ex contractu, vel ex delicto*; being founded upon *contracts*, or for *wrongs*, independently of contract<sup>b</sup>. Actions upon CONTRACTS are *Account, Annuity, Assumpsit, Covenant, Debt, Detinue, and Scire facias*.

ACCOUNT lies at common law against a *guardian* in *socage, bailiff, or receiver*, to compel an account of profits, or monies received by the defendant<sup>c</sup>; and, by the statute 4 and 5 Ann. c. 16. § 27. it may be maintained against the executors and administrators of every guardian, bailiff, and receiver, and also by one joint-tenant and tenant in common, his executors and administrators, against the other, as *bailiff*, for receiving more than comes to his just share or proportion, and against his executors and administrators. The proceedings in this action being difficult, dilatory, and expensive, it is now seldom used, especially as the party has in general a more beneficial remedy, by action for money had and received, &c. or if the matter be of an intricate

<sup>b</sup> 1 Bac. Abr. 26. Gilb.  
C. P. 5.

<sup>c</sup> Co. Lit. 172. a.

nature,



nature, it is advisable to resort to a court of equity.

ANNUITY is an action which lies for the recovery of an annuity, or yearly payment of a certain sum of money, granted to another in fee, for life, or years, charging the person of the grantor only; and it may be brought by the grantee or his heirs, or his or their grantee, against the grantor or his heirs, if specially named<sup>d</sup>. This action is also out of use, being superseded by the action of *debt* or *covenant*.

ASSUMPSIT, which is now become the most common action of any upon *contracts*<sup>e</sup>, lies for the recovery of *damages* upon contracts, express or implied, without deed. These contracts are various, according to the subject matter of them. In general, they are to pay or repay money, or to do or forbear some other act. In point of form, the counts (or statements of the causes of action) in *assumpsit*, are common or special. Common counts are, first, the *indebitatus assumpsit*, which lies on a promise to pay a precedent debt, for monies, services and works, the sale and hire of goods, or the purchase, assignment, or use of lands, &c.: secondly, the *quantum meruit*, or *valebant*, on a promise

<sup>d</sup> Co. Lit. 144. b.

is properly an action upon the

<sup>e</sup> The action of *assumpsit*, case. 1 Bac. Abr. 30. Gilb. though founded upon contract, C. P. 6.

#### OF ACTIONS, &c.

to pay the plaintiff, for the like considerations, as much as he *deserved* to have, or for goods, &c. as much as they were reasonably *worth*: thirdly, the *in simul computassent*, on an account stated between the parties.

*Special* counts in *assumpsit*, are founded, first, on *legal liabilities* to pay money, as in the case of promissory notes, bills of exchange (inland or foreign), bye laws, or foreign judgments; or for fines on admission to copyhold premises, legacies charged on land, tolls, port-duties, contributions to party-walls, &c. secondly, on *mutual promises*, to pay wagers, or money lost at play, or to perform policies of assurance, awards, or special agreements: thirdly, on promises to pay money, in *consideration* of forbearance, (to the defendant or to third persons,) indemnity, marriage, services and works, necessities, the sale, exchange, hire, or conveyance of cattle or goods, or the sale, assignment, or use of lands, &c.: and lastly, on promises to do or forbear some other act, as to guarantee, indemnify, marry, serve or employ, perform works, execute professional employments; upon a sale or exchange of cattle or goods, to accept, deliver, take back, or warrant them; concerning goods lent, or let to hire; against carriers, (by land or by water,) wharfingers, innkeepers, farriers, or other bailees; respecting securities; to account for goods,

&c. or to take, deliver possession of, hold, repair, or quit lands, &c.

COVENANT lies for the recovery of *damages*, upon contracts by deed; as. upon leases, mortgages, articles of agreement, charter-parties of affreightment, indentures of apprenticeship, &c. DEBT lies for the recovery of a sum *certain*, upon simple contracts, specialties, or records; or is founded *in maleficio*, as for escapes, or upon acts of parliament, by the party grieved, or common informers. DETINUE lies, upon a bailment or trover<sup>f</sup>, for the recovery of goods *in specie*, or damages for detaining them. SCIRE FACIAS lies, by or against the parties or their representatives, to have execution on a judgment, statute, or recognizance, for the sum recovered, or acknowledged to be due.

Actions for WRONGS are *Case*, *Replevin*, and *Trespass vi et armis*.

Actions on the CASE are founded on the common law, or given by act of parliament; and lie to recover *damages*, for consequential wrongs or torts, arising from *malefeazance*, or doing what the defendant ought not to do; *non-feazance*, or not doing what he ought to do; and *misfeazance*, or doing what he ought to do,

<sup>f</sup> The action of *detinue*, an action for a wrong, than when brought upon a trover upon contract. or finding, seems to be rather

improperly. These actions are for torts to *persons*, absolutely or relatively; to *personal* property, or some right or privilege resulting therefrom, and to *real* property, corporeal or incorporeal.

To persons *absolutely*, they are for some consequential hurt or damage, arising from public nuisances, keeping mischievous animals<sup>a</sup>, or improper conduct of surgeons, &c. for conspiracy, maintenance, malicious prosecutions, (of civil suits, or criminal charges,) libels, *scandalum magnatum*, or defamation of common persons. To persons *relatively*, they are for criminal conversation, seducing or harbouring wives, debauching daughters, enticing away or harbouring apprentices and other servants, or for menacing, beating, or imprisoning wives, daughters, or servants, *per quod consortium vel servitium amisit*<sup>b</sup>.

To

<sup>a</sup> This and some other of the wrongs here mentioned, as affecting *persons*, may and do frequently affect *personal* property. And on the other hand, some of the wrongs hereafter referred to, as affecting *personal* property, may and do sometimes affect *persons*, as *negligence* in riding horses and driving carriages, &c.

<sup>b</sup> Actions of criminal conversation, and for menacing, beating, or imprisoning wives, &c. being laid *vi et armis* and *contra pacem*, are usually considered as actions of *trespass*. Mr. Justice *Blackstone*, in treating of an action of this nature, calls



To *personal* property, or some right or privilege resulting therefrom, they are against sheriffs and other officers, for escapes, false returns, or taking insufficient bail, &c. or against other persons, for doing or omitting something, contrary to the general obligation of law, the particular duties of their trades or callings, or some promise or engagement, express or implied. Of this description are, actions of trover and conversion; for excessive or irregular distresses, pound breach, and rescue of distresses for rent, or damage feasant; rescue of prisoners; unlawfully exercising trades, or imitating inventions; *negligence*, in riding horses, driving carriages, navigating vessels, or performing works; *deceit*, on the sale of cattle or goods, or immoderate use of them, when lent or let to hire; and

calls it an action of *trespass*, in nature of an action upon the case. 3 Blac. Com. 140. But I have ventured to class these actions as actions on the case, for the following reasons; first, that the wrongs complained of therein are not immediate, but consequential; secondly, that the plaintiff may declare for them by bill with a *quod cum*, which is not allowed in *trespass*; 2 Salk. 636. 1 Str. 621; thirdly, that in these actions, the plea of the statute of limitations is not guilty within *six* years, 2 Bur. 753. and not, as in *trespass* and assault, within *four* years; 2 Salk. 421.; and lastly, that though the plaintiff should not recover forty shillings *damages*, he is nevertheless entitled to full *costs*. 1 Salk. 206. 2 Ld. Raym. 831. S. C. 3 Wils. 319.



against carriers, by land or by water, wharfingers, innkeepers, farriers, &c.

To *real* property *corporeal*, they are for nuisances of a private nature, to houses, lands, &c. to the prejudice of the plaintiff's possession or reversion; against tenants, in nature of waste; for not repairing fences, or for not carrying away tithes, &c. And to *real* property *incorporeal*, they are for disturbance of common of pasture or estovers, ways, offices, franchises, tolls, ferries, and seats in churches.

REPLEVIN lies to recover damages for an immediate wrong, without force, in taking away and detaining cattle or goods; and answers to the action of trespass *de bonis asportatis*. And TRESPASS *vi et armis* lies, to recover damages for immediate wrongs, accompanied with force; to the *person*, by menaces, assault, battery, wounding, mayhem, or false imprisonment; to *personal* property, by destroying, damaging, taking away, detaining, or converting cattle or goods; and to *real* property, as to houses, lands, fisheries, or watercourses.

Upon *contracts*, the action should be brought by the party with whom the contract was made, if living; or by his executors or administrators, if he be dead; or by his assignees, if a bankrupt, or discharged under an insolvent debtor's act: And it should be brought against the party who made  
the

the contract, or if he be dead, against his executors or administrators: But upon the contract of a bankrupt or insolvent debtor, an action at law does not lie against his assignees. Where there are *several* parties to a contract, the action should be brought by or against all of them, if living; or if some are dead, by or against the survivors: And an action may be brought by or against a surviving partner, for his own debt, as well as for that which was contracted in the lifetime of the deceased<sup>1</sup>. If an action be brought upon a joint contract, by one of several partners, the plaintiff will be nonsuited, or have a verdict against him<sup>2</sup>: But if it be brought against one of several partners, he can only plead in abatement; though the plaintiff knew, and even contracted with the other partners<sup>3</sup>.

For *wrongs*, the action must be brought by the party to whom the injury is done, against the party doing it. And if either of the parties die, the action is gone; for it is a rule, that *actio personalis moritur cum persona*. But there are some exceptions to this rule, chiefly arising from an equitable construction of the statute 4 Edw. III. c. 7. by which *executors* shall have an action of trespass, for a wrong done

<sup>1</sup> 3 T. R. 433. 5 T. R. 493. 6 T. R. 582.  
<sup>2</sup> 2 Str. 820.

<sup>3</sup> 2 Atk. 510. 5 Bur. 2611.  
 2 Blac. Rep. 947. 5 T. R. 649.

to their testator<sup>m</sup>. Where several parties are jointly concerned in interest, or have suffered a joint injury<sup>n</sup>, they may and ought to join in the same action; and if they do not, the defendant may plead in abatement, but cannot otherwise take advantage of the objection<sup>o</sup>. And as wrongs are of a joint and several nature, the plaintiff may proceed against all, or any of the parties who committed them: And it is no plea in abatement, that there are other partners not named<sup>p</sup>. In actions by or against husband and wife, wherever the cause of action would survive to or against the wife, they ought in general to sue or be sued jointly<sup>q</sup>; and this rule holds as well with regard to contracts as wrongs. But sometimes, and particularly where the cause of action arises during coverture, the husband is allowed to bring the action in his own name, or in the joint names of himself and his wife.

The plaintiff in some cases, has his *election* to bring one species of action or another for the same cause; as in actions upon contracts, he may bring *assumpsit* or *debt* upon a simple contract, or *debt* or *covenant* upon a specialty, for

<sup>m</sup> 2 Bac. Abr. 444, 5. and see Cowp. 375.

<sup>o</sup> 6 T. R. 766. 7 T. R. 279.

<sup>p</sup> 2 Saund. 115. 1 Vent. 167. 2 Lev. 97. 8. C. 1 Ld. Raym. 127. 2 Willf. 414.

<sup>q</sup> 5 T. R. 649. but see 6 T. R. 369.

<sup>r</sup> 1 Willf. 224. 2 Willf. 227.

the non-payment of money: Or, if the breach of a simple contract consist in *misfeasance*, he may declare in *assumpsit*, or in *case* on the special circumstances'; as for *deceit* on the sale of cattle or goods, or immoderate use of them when lent or let to hire; and against attornies, carriers, wharfingers, innkeepers, &c. And where cattle or goods are wrongfully taken and detained, he may bring trespass *vi et armis*, *trover*, or *detinue*; or if they are converted into money, he may waive the tort, and bring *assumpsit* for money had and received'. But the plaintiff, having once made his election, cannot afterwards bring another action for the same cause, either whilst the former is depending, or after it has been determined.

It is a rule, that several courts may be *joined* in the same action for different causes, *provided they are of the same nature*. And conformably to this rule, the plaintiff may, in each of the several *species* of action before-mentioned, join counts for as many different causes as belong to that *species*. And *debt* and *detinue* may be joined in the same action'. So the plaintiff may join *trespass* and *battery* of his servant, *per*

' 2 Willf. 319. 3 Willf.

348. 1 T. R. 274.

' Com. Dig. tit. *Action*, M.

' Gilb. C. P. 5. 1 Bac.

Abr. 30.

*quod servitium amisit*“, or *trespass* and *rescue*“, though the loss of service, and consequence of the rescue, are properly the subjects of an action on the *case*. But with these exceptions, the plaintiff cannot join counts in any one *species* of action, with counts in another“.

In order to join several causes in one action, it must be brought, as to all of them, *in the same right*; and upon that ground it is holden, that a plaintiff cannot join in the same action a demand as *executor*, with another which accrued in his

“ Aleyn, 9. 1 Bac. Abr. 340.

v 2 Lutw. 1249. Ld. Raym. 83. There is also a writ in the Register, *de uxore abductâ, cum bonis viri*. F. N. B. 89. but this writ has been said to be against law. 2 Salk. 637.

“ Several rules are to be met with in the books, by which the *joinder of action* is made to depend on the similarity of the *process*, the *plea*, and the *judgment*. See Gilb. C. P. 6, 7. 1 Bac. Abr. 30. 1 Wils. 252. 2 Wils. 321. 1 T. R. 276. 4 T. R. 347. But these rules will be found upon examination to be defective. All that can be deduced from them is, that where the process, or the plea and judgment, are different, the actions cannot be joined; but it by no means follows, that they may be joined, where the process, or the plea and judgment are the same; for in actions of trespass *vi et armis*, and actions on the case, there is the same process of *attachment* and distress infinite, the same plea of *not guilty*, and the same judgment for *damages*; and yet it is clear, that an action of trespass *vi et armis* cannot, except in the instances that have been mentioned, be joined with an action on the case.

own



own right<sup>2</sup>. But a count for money had and received by the defendant to the use of the executor, as such, may be joined with a count for money had and received to the use of the testator<sup>3</sup>. An executor or administrator may declare, as such, on an account stated by the defendant, with the testator or intestate, or of monies due to himself in his representative character. And where a testator or intestate has stated an account, it is usual to declare for the balance, against his executor or administrator. Or if an executor or administrator state an account, *of monies due from the testator or intestate*, he may be declared against, as such, for what appears to be due<sup>4</sup>. And in any of the above cases, other causes of action, in the same right, may be joined in the declaration<sup>5</sup>. But if an account be stated by an executor or administrator, *of monies due from him in his representative character*, this will not charge the estate, or subject him to an action in that character.

The assignees of A. a bankrupt, and also of B. a bankrupt, under separate commissions, cannot recover, in the same action, a joint debt due from the defendant to both the bankrupts,

<sup>2</sup> 2 Ld. Raym. 841. <sup>3</sup> Str. 73 T. R. 659.

<sup>4</sup> 1271. <sup>5</sup> 2 T. R. 659. <sup>6</sup> 4 T. R. 21 H. Blac. 102.

277.

<sup>7</sup> Id. 108.

and also *separate* debts due to each; and if in such an action the jury have assessed the damages severally, on the separate counts, the court will arrest the judgment on those counts which demand the debts due to each bankrupt separately<sup>b</sup>. But where the plaintiffs sued as assignees of A. and B., and also as assignees of C., for a joint demand, due to all the bankrupts, the declaration was holden good, on a motion in arrest of judgment<sup>c</sup>.

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I shall next proceed to shew within what *time* an action must be brought; and in what cases a previous *Notice* or *Demand* is necessary to support it.

The *limitation* of personal actions is regulated by several statutes. By the 31 Eliz. c. 5. § 5.  
 “ All actions brought for any forfeiture; upon a  
 “ penal statute, whereby the forfeiture is limited  
 “ to the king only, shall be brought within two  
 “ years after the offence committed, and not  
 “ after. And all actions brought for any for-  
 “ feiture, upon a penal statute, except the sta-  
 “ tute of tillage, the benefit whereof is limited  
 “ to the king and the informer, shall be brought  
 “ within one year after the offence committed;  
 “ and in default thereof, the same shall be

<sup>b</sup> 3 T. R. 433.

<sup>c</sup> Id. 779.

“ brought

“brought for the king, at any time within two  
 “years after that year ended. And if any ac-  
 “tion shall be brought after the time so limited,  
 “the same shall be void. Provided, that where  
 “a shorter time is limited, the action shall be  
 “brought within that time.” This statute  
 extends to all actions brought upon penal sta-  
 tutes, whereby the forfeiture is limited to the  
 king, or to the king and the party, whether  
 made before or since the 31 Eliz. But it does  
 not extend to actions brought by the party  
*grieved*<sup>d</sup>; and where the penalty is given to  
 a common *informer* alone, different opinions  
 have been entertained, whether it is within the  
 statute. On the one hand it has been said, that  
 this is not a case within the words of the act,  
 which ought to be taken strictly, and not extend-  
 ed by an equitable construction. On the other  
 hand it has been alledged, that as the informer  
 is bound, when the king is joined with him,  
 much more should he be bound, when he sues  
 by himself<sup>e</sup>. And accordingly, where an action  
 was brought, after a year, by a common in-  
 former, on the statute 9 Ann. c. 14. the court  
 of common pleas held this to be a case within  
 the 31 Eliz. though the action be given in the

<sup>d</sup> Show. Rep. 353, 4. Carth. 12 Mod. 27. S. C.  
 233. Comb. 194. 4 Mod. 129.    <sup>e</sup> 1 Ld. Raym. 78.

first instance to the party grieved, and afterwards to the common informer alone; for such actions would have been within the 7 Hen. VIII., and the 31 Eliz. was made to narrow the time given by that statute, and could never mean to leave any actions unrestrained in time; the latter part of the clause must therefore be construed to extend to them<sup>f</sup>.

By the statute 21 Jac. I. c. 16. § 3. it is enacted, " That all actions of *trespass quare clausum fregit*, &c. *detinue*, *trover*, and *replevin* for taking away goods or cattle; all actions of *account* and upon the *case*, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants; all actions of *debt* grounded upon any lending or contract without specialty, or for arrearages of rent; and all actions of *assault*, *menace*, *battery*, *wounding*, and *imprisonment*, shall be commenced and sued within the times hereafter expressed, and not after; that is to say, the said actions upon the *case*, (other than for *slander*,) *account*, *trespass quare clausum fregit*, &c. *debt*, *detinue*, and *replevin*, within six years next after the cause of such actions or suit, and not after; actions of *assault*, *battery*, *wounding*, or *imprisonment*,

<sup>f</sup> *Lookup v. Sir T. Frederick*, M. 6 G. III. *Bul. Ni. Pri.* 195.

" within



“ within FOUR years ; and actions upon the *case*  
“ for *words*, within two years next after the  
“ words spoken, and not after.”

“ Nevertheless, if in any of the said actions,  
“ judgment be given for the plaintiff, and the  
“ same be reversed by error ; or a verdict pass  
“ for the plaintiff, and upon matter alledged in  
“ arrest of judgment, the judgment be given  
“ against the plaintiff, that he take nothing by  
“ his plaint, writ, or bill ; or if any of the said  
“ actions shall be brought by original, and the  
“ defendant therein be outlawed, and shall after  
“ reverse the outlawry, that in all such cases, the  
“ party plaintiff, his heirs, executors, or admini-  
“ strators, as the case shall require, may com-  
“ mence a new action, within a year after such  
“ judgment reversed, or given against the plain-  
“ tiff, or outlawry reversed, and not after.”

“ And if any person or persons, entitled to any  
“ of the said actions, shall be at the time of any  
“ such cause of action accrued, within the age  
“ of twenty-one years, feme-covert, *non com-*  
“ *pos mentis*, imprisoned, or beyond the seas ;  
“ then such person or persons shall be at liberty  
“ to bring the same actions, within such times as  
“ are before limited, after their coming to or  
“ being of full age, discoverd, of sane me-  
“ mory, at large, and returned from beyond  
“ the seas.”



Suits in the Admiralty court, for *Seamen's* wages, not being provided for by these statutes<sup>b</sup>, it was enacted by the 4 Ann. c. 16. § 17. that “all suits and actions in the court of Admiralty, for seamen’s wages, shall be commenced and sued within *six* years next after the cause of such suits or actions shall accrue, and not after;” with the like proviso as before, in favour of persons within the age of twenty-one years, &c. And in the case of a *defendant* beyond sea<sup>h</sup>, it was enacted, by the same statute, §. 19. that “if any person or persons, *against* whom there shall be any such cause of suit or action for seamen’s wages, or any of the causes of action mentioned in the 21 Jac. I., shall be, at the time of any such cause of suit or action accrued, beyond the seas, then the person or persons entitled to any such suit or action, shall be at liberty to bring the said actions, against such person and persons, after their return from beyond the seas, within such times as are respectively limited for the bringing of the said actions, by this act, and by the said other act of 21 Jac. I.”

These statutes are confined to the particular actions enumerated therein; and do not extend

<sup>b</sup> 2 Ld. Raym. 934. 3 Salk. S. C.  
 227. 6 Mod. 25. S. C. 2 Ld. <sup>h</sup> 2 Salk. 420.  
 Raym. 1204. 2 Salk. 424.

to actions of *annuity*, or of *account* concerning the trade of merchandize between merchant and merchant, where the accounts are open and current; nor to actions of *covenant*, or *debt* on *specialty*, or other matter of a higher nature; but only to actions of *debt*, upon a lending or contract without *specialty*, or for arrearages of rent, reserved on parol leases<sup>1</sup>. A *scire facias* also, being founded on matter of record, is not within the statutes of limitations. And in some other actions, particular times of limitation are frequently appointed by statute, different from those in common cases; as in actions against justices of the peace, constables, headboroughs, &c. which must be commenced within *six* months<sup>2</sup>, and in actions against officers of the excise or customs, &c. which must be commenced in *three* months<sup>1</sup>, after the act committed.

In actions of *assumpsit*, if the plaintiff be in *England*, when the cause of action accrues, though he afterwards go abroad, the time of limitation begins to run, so that if he, or his representatives, do not sue within six years, the statute is a bar<sup>m</sup>. And if one plaintiff be abroad,

<sup>1</sup> Hut. 109. 1 Saund. 38. 24 Geo. III. Sess. 2. c. 47.  
<sup>2</sup> Saund. 66. § 35.

<sup>2</sup> 24 Geo. II. c. 44. § 8. <sup>m</sup> 1 Will. 134.

<sup>1</sup> 23 Geo. III. c. 70. § 34.

and others in *England*, the action must be brought within six years after the cause of action arises<sup>n</sup>. It has also been determined, that the statute of limitations extends to persons in *Scotland*<sup>o</sup>. But if the plaintiff be abroad, or beyond the sea, at the time when the cause of action accrues, the statute will not run against him, till his return to this country<sup>p</sup>. And if the plaintiff be a foreigner, and do not come to *England* for a great many years, after the cause of action arises, he still has six years after his coming thither, to bring his action<sup>q</sup>: And if he never come to *England* himself, he has always a right of action while he lives abroad; and after his death, his executors or administrators are in the same situation.

The statute cannot be a bar in any case, unless the time of limitation is expired, after there hath been a complete cause of action; as if a man promise to pay ten pounds to J. S. when he comes from *Rome*, or when he marries, and ten years after J. S. marries, or comes from *Rome*, the right of action accrues from the happening of the contingency, from which time the statute will begin to run, and not from the

<sup>n</sup> 4 T. R. 516.

S. C.

<sup>o</sup> 1 Blac. Rep. 286.

<sup>q</sup> 3 Will. 145. 2 Blac. Rep.

<sup>p</sup> 2 Str. 836. Fitzgib. 81.

723. S. C.

time of the promise'. So in *assumpsit*, where the plaintiff declared, that the defendant, in consideration that the plaintiff, at the defendant's request, would receive A. and B. into his house as guests, and diet them, promised, &c. the defendant pleaded *non assumpsit infra sex annos*, upon which the plaintiff demurred, and it was held no plea; for the defendant cannot in such case plead *non assumpsit infra sex annos*, but *actio non accrevit infra sex annos*; for it is not material when the promise was made, if the cause of action be within the six years, and the dieting might be long afterwards\*.

To take a case out of the statute of limitations, it is usual in *assumpsit* to prove a promise to pay, or acknowledgment of the debt, within six years before the commencement of the action. And a *conditional* promise has been held sufficient for this purpose, as well as an *absolute* one; as where the defendant said to the plaintiff, *prove your debt, and I will pay it*'. But it was formerly doubted, whether a bare *acknowledgment* of the debt, without a *promise* of payment, was sufficient to take the case out of the statute'; such

\* Godb. 437. 1 Lev. 48.      \* 1 Ld. Raym. 389, 422.  
 1 Blac. Rep. 354. 1 H. Blac.      1 Salk. 29. Carth. 470. 5  
 631.      Mod. 425. S. C. and see  
 \* 2 Salk. 422. 2 Ld.      2 Show. 126. 2 Vent. 151.  
 Raym. 838. S. C.      12 Mod. 224.



an acknowledgment being only considered as evidence of a promise, as in *trover*, where a demand and refusal is not held to be a conversion, but only evidence of it. A bare acknowledgment however<sup>u</sup>, and that of the slightest nature<sup>v</sup>, is now deemed sufficient to prevent the operation of the statute. And an acknowledgment by one of several drawers of a joint and several promissory note, will take the case out of the statute, as against any one of the other drawers, in a separate action on the note against him<sup>w</sup>. So where one of two drawers of a joint and several promissory note having become a bankrupt, the payee receives a dividend under the commission on account of the note, this will prevent the other drawer from availing himself of the statute, in an action brought against him for the remainder of the money due on the note, the dividend having been received within six years before the action brought<sup>x</sup>. If a letter be written by a defendant to the plaintiff's attorney, on being served with a writ, couched in ambiguous terms, neither expressly admitting or denying the debt, it should be left to the jury, to consider whether it amounts to an acknowledg-

<sup>u</sup> 2 Bur. 1099.

<sup>v</sup> 5 Bur. 2630.

<sup>w</sup> Doug. 652, 3.

<sup>x</sup> 2 H. Blac. 340.



ment of the debt<sup>1</sup>. And if there be a mutual account of any sort between the plaintiff and defendant, for any *item* of which credit has been given within six years, that is evidence of an acknowledgment of there being such an open account between the parties, and of a promise to pay the balance, as to take the case out of the statute<sup>2</sup>.

In order to shew that the action was commenced in due time, a bill of *Middlesex* or *latitat* is as effectual as an *original writ*<sup>3</sup>. And an *attachment* of privilege is holden to be a good commencement of the suit<sup>4</sup>, even though it be informal<sup>5</sup>. But an *attachment* of privilege is not a continuance of a bill of *Middlesex*, so as to avoid the statute<sup>6</sup>. As against an *attorney* or officer of the court, or a *prisoner* in the actual custody of the marshal, the statute can only be avoided, by filing a *bill* with the clerk of the declarations, in the King's Bench office; which bill may be filed in vacation, as well as in term time<sup>7</sup>. In proceeding against a *cor-*

<sup>1</sup> 2 T. R. 760.

<sup>2</sup> 6 T. R. 189.

<sup>3</sup> Sty: Rep. 156, 178. 1

Sid. 53, 60. Carth. 233. 2

Ld. Raym. 880. 1 Str. 550.

2 Str. 736. 2 Ld. Raym.

1441. S. C. 2 Bur. 561. 1

Blac. Rep. 215. S. C. 3 Bur.

1241. 1 Blac. Rep. 312. S. C.

2 Blac. Rep. 925.

<sup>4</sup> 1 Show. 366. 2 Salk.

420. S. C.

<sup>5</sup> 2 Blac. Rep. 1131.

<sup>6</sup> 3 T. R. 662.

<sup>7</sup> Doug. 313, 14. 5 T. R.

173, 325.

*potation*, or *hundredors* on the statutes of hue and cry, &c. an *original* writ must be sued out for avoiding the statute. And where a *peer* of the realm, or *member* of the house of commons, is defendant, the plaintiff must proceed for that purpose, either by suing out an *original* writ, and getting it returned *nihil*<sup>f</sup>, or by *bill* and *summons* on the statute 12 & 13 W. III. c. 3. § 2.

When a writ is sued out to avoid the statute of limitations, it should regularly be *returned* by the sheriff, and *entered* on a roll, with *continuances* to the time of declaring<sup>g</sup>. And the plaintiff cannot give a writ in evidence, without shewing it to be returned, unless he declare thereon within a year after it is returnable<sup>h</sup>; for until it be returned, the court is not in possession of the cause, so as to award an *alias* or *pluries* for bringing the defendant into court<sup>i</sup>. But if the plaintiff declare within the year, he may give the writ in evidence, without shewing it to be returned<sup>j</sup>. The writ should be entered on a roll of that term, in which it was returnable; and the roll docketed with the clerk of the judgments, and afterwards filed in the treasury of

<sup>f</sup> 1 Lev. 111. 2 Ld. Raym. 1113.

<sup>h</sup> 7 Mod. 3. 1 Lutw. 260.  
<sup>i</sup> Ld. Raym. 435. S. C. 2

<sup>g</sup> See the Appendix to Ld. Raym. 883.  
Chap. I. [A]

<sup>j</sup> 7 T. R. 6.

<sup>k</sup> 6 T. R. 617.

the court<sup>k</sup>. In replying to a plea of the statute of limitations, except by *original*<sup>l</sup>, the plaintiff should shew that the cause was regularly continued, by *vicecomes non misit breve*, from the return of the writ, to the time of declaring<sup>m</sup>: But these continuances are mere matter of form, and may be entered at any time<sup>n</sup>: It has even been holden, that they may be made by the attornies in their chambers<sup>o</sup>.

If a plaint be levied in an *inferior* court, within the six years, and then it is removed into the King's Bench by *habeas corpus*, and the plaintiff declares here *de novo*, and the defendant pleads the statute of limitations, the plaintiff may reply, and shew the plaint in the inferior court, and that will be sufficient to avoid the statute<sup>p</sup>. So where one brings an action before the expiration of six years, and dies before judgment, the six years being then expired, this shall not prevent his executor from bringing a new action<sup>q</sup>, provided he does it *recently*, or within a reasonable time. What shall be deemed

<sup>k</sup> Imp. K. B. 528.

<sup>l</sup> 1 Wilf. 167, 8.

<sup>m</sup> 1 Show. 366. 2 Salk. 420. S. C. 1 Lutw. 260. 1 Ld. Raym. 435. S. C.

<sup>n</sup> *Bates qui tam v. Jenkinson*, E. 24 G. III. 6 T. R. 618.

<sup>o</sup> 1 Sid. 53, 60. and see

<sup>2</sup> Salk. 590.

<sup>p</sup> 1 Sid. 228, 1 Lev. 143.

S. C. 1 Ld. Raym. 553.

<sup>2</sup> Salk. 424. 2 Str. 719. 2

Ld. Raym. 1427. S. C.

<sup>q</sup> 2 Salk. 425.

a reasonable time in this case is a matter of considerable doubt, and there are various opinions in the books upon the subject. In *Spencer's case*<sup>r</sup>, it is said to be entirely in the discretion of the court: In another case it is said, that heretofore they used to allow half a year, but that was held to be too long, and therefore they allowed but thirty days<sup>s</sup>: In a third case, a year was said to be a reasonable time<sup>t</sup>: And this opinion was adhered to in a subsequent case<sup>u</sup>, in analogy to that part of the statute, which authorizes the party to bring a new action, within a year after the reversal of the judgment by writ of error<sup>v</sup>, &c. But whatever may be the precise rule upon this subject, it seems, that if a new action be brought within half a year, after the abatement of the former, it would be sufficient to avoid the statute<sup>w</sup>.

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In some of the statutes, that limit the time for bringing personal actions, there are clauses directing *notice* to be given to the parties, against

<sup>r</sup> 6 Co. 10.

32. b.

<sup>s</sup> 1 Ld. Raym. 283. 1 Salk. 393. S. C. and see 1 Lutw. 297.

<sup>u</sup> 2 Str. 907. Fitzgib. 170. 289. Barnardist. 335. S. C.

<sup>v</sup> Cro. Car. 294.

<sup>t</sup> 1 Ld. Raym. 434. 1 Lutw. 256. S. C. and see 6 Edw. III.

<sup>w</sup> Cowp. 738, 40.



whom the actions are intended to be brought, in order that they may have an opportunity of tendering amends\*. Thus, by the statute 24 Geo. II. c. 44. § 1. it is enacted, "that  
"no writ shall be sued out against, nor any copy  
"of any process at the suit of a subject shall  
"be served on, any justice of the peace, for  
"any thing by him done in the execution of  
"his office, until notice in writing of such  
"intended writ or process shall have been  
"delivered to him, or left at the usual place  
"of his abode, by the attorney or agent for  
"the party who intends to sue or cause the  
"same to be sued out or served, at least one  
"calendar month before the suing out or serving the same; in which notice shall be clearly  
"and explicitly contained, the cause of action  
"which such party hath or claimeth to have  
"against such justice of the peace; on the back  
"of which notice shall be indorsed the name of  
"such attorney or agent, together with the  
"place of his abode, who shall be entitled  
"to have the fee of twenty shillings for the  
"preparing and serving such notice, and no  
"more."

A similar notice is required to be given to officers of the excise and customs, by the

\* Append. Chap. I. [B.]



23 Geo. III. c. 70. § 30. and 24 Geo. III. Seff. 2. c. 47. § 35. upon which statutes it has been holden, that the month begins, the day on which the notice is served<sup>7</sup>; and that an excise officer is entitled to notice, before an action is brought against him, for an act not warranted by his official capacity, if done *bona fide*, in the supposed execution of his duty, such as the assaulting of an innocent person, whom he suspects to be a smuggler, employed in running goods<sup>8</sup>.

Lastly, a *demand* is in some cases necessary to be made, previous to the commencement of the action<sup>9</sup>. Thus, by the statute 24 Geo. II. c. 44. § 6. "No action shall be brought  
" against any constable, headborough, or other  
" officer, or against any person or persons acting by his order and in his aid, for any thing  
" done in *obedience* to any warrant under the  
" hand or seal of any justice of the peace, until  
" *demand* hath been made, or left at the usual  
" place of his abode, by the party or parties  
" intending to bring such action, or by his, her,  
" or their attorney or agent, in writing, signed  
" by the party demanding the same, of the  
" perusal and copy of such warrant, and the  
" same hath been refused or neglected for the

<sup>7</sup> 3 T. R. 623.

<sup>8</sup> 5 T. R. 1.

<sup>9</sup> Append. Chap. I. [C.]

“space of six days after such demand: And in  
“case after such demand and compliance there-  
“with, any action shall be brought against such  
“constable, &c. without making the justice or  
“justices who signed or sealed the said warrant  
“defendant or defendants, that on producing  
“and proving such warrant at the trial of such  
“action, the jury shall give their verdict for the  
“defendant or defendants, notwithstanding any  
“defect of jurisdiction in such justice or jus-  
“tices.”

“And if such action be brought jointly  
“against such justice or justices, and also  
“against such constable, &c.; then on proof  
“of such warrant, the jury shall find for such  
“constable, &c. notwithstanding such defect  
“of jurisdiction as aforesaid: And if the verdict  
“shall be given against the justice or justices,  
“in such case the plaintiff or plaintiffs shall re-  
“cover his, her, or their costs against him or  
“them; to be taxed in such manner, by the  
“proper officer, as to include such costs as the  
“plaintiff or plaintiffs are liable to pay to the  
“defendant or defendants, for whom such ver-  
“dict shall be found.”

The intent of these provisions was to prevent  
the constable or other officer, when acting in  
*obedience* to his warrant, from being answer-  
able, on account of any defect of jurisdiction  
in

in the justice. And it has been determined, that a *churchwarden* taking a distress for a poor's rate, under a warrant of magistrates, is entitled to the protection of the above statute, in having the magistrates made defendants with him, in an action of trespass<sup>b</sup>.

<sup>b</sup> 7 T. R. 270.

## C H A P. II.

*Of the BILL, and PROCESS IN TRESPASS.*

THE means of commencing a personal action in this court are—

- I. BY BILL, in *trespass*.
- II. BY BILL, against *prisoners*, in the actual or supposed custody of the marshal.
- III. BY ATTACHMENT OF PRIVILEGE, at the suit of *attornies* and other *officers* of the court.
- IV. BY BILL, against *attornies* and other *officers* of the court.
- V. BY ORIGINAL WRIT, against *common* persons, *corporations*, and *bundredors*.
- VI. BY ORIGINAL WRIT and BILL, against *peers* of the realm, and *members* of the house of commons.

This court has an original jurisdiction in actions for trespasses *vi et armis*, committed in *Middlesex*, or other county where the court sits\*; and when the defendant is brought into court by process in *trespass*, the plaintiff is allowed to waive or abandon his original complaint, and to exhibit his bill, and declare against him, as a prisoner, for any *other* species

\* Trye's *Jus Filizarii*, 98.

of injury<sup>b</sup>. The process in trespass therefore has become the common mode of commencing actions in this court, against persons out of custody, who are unprivileged, and subject to a *capias*. But this process does not lie against *prisoners* in the actual custody of the marshal, nor against *attornies* and other officers of the court, who must be proceeded against in the first instance by a *bill* stating the real cause of action; neither does it lie against *corporations*, or *bundredors*, on the statutes of hue and cry, &c. who, not being subject to a *capias*, must be sued by *original writ*; nor against *peers* of the realm, or *members* of the house of commons, who, for the same reason, must be sued by *original writ*, or *bill* for the real cause of action, stating them to have privilege of parliament.

The foundation of the process in trespass is a *BILL*, *queritur*, or *plaint*<sup>c</sup>, which differs from what is usually termed the *bill of Middlesex*, the latter being rather a *precept*<sup>d</sup>, or process founded on the bill, than the bill itself, as is evident from the words "*by bill*" at the end of it<sup>e</sup>. The first

<sup>b</sup> R. E. 15 G. II. Cowp. 455.

<sup>c</sup> Append. Chap. II. [A.]

<sup>d</sup> Trye, 97. 2 Sid. 129. 2 Str. 1069.

<sup>e</sup> In Trye's *Jus Filizarii*, published in 1684, it is said, that there were several files of bills or plaints in trespass, then remaining in the former upper treasury of this court; and the



first process on this bill was anciently a precept, in nature of an *attachment*<sup>f</sup>, upon which the sheriff returned, either that he had attached the defendant, or that he had nothing by which he could be attached. On the latter return, if the defendant did not appear, there issued into *Middlesex*, or other county where the court sat, a precept in nature of a *capias*, commanding the sheriff of that county to take the defendant, if he should be found in his bailiwick, and safely keep him, so that he might have his body before the king, at a certain time and place therein mentioned, to answer the plaintiff, in a plea of *trespass*<sup>g</sup>, &c. This precept, being now used as the first process in trespass, when the defendant is in *Middlesex*, is therefore (though somewhat improperly) called a *bill of Middlesex*. If the defendant cannot be arrested upon, or served with a copy of this process, the plaintiff may sue out an *alias*, and after that (if necessary) a *pluries* bill of *Middlesex*, commanding the sheriff, as *before*, or as *oftentimes*,

the profits arising from them were formerly so considerable, that they were always excepted by the chief justice, out of the grant of the office of *custos breviarum*. P. 98, 100. See also Rich. Pr. K. B. 24.

<sup>f</sup> Trye, 99. Stat. 8 Eliz. Chap. II. Brown's *Vade Mecum*, 526. and see Append. Chap. II. [B.]

<sup>g</sup> Append. Chap. II. [C.]

D

he

he has been commanded, to take the defendant, &c.<sup>h</sup> The *alias capias*, &c. should correspond with the previous process, in the names of the parties: Therefore, in a late case, where an action was brought against *Bates* and another, for an act done by them as justices of the peace, and the *latitat* against *Bates* was by the name of *William*, and the *alias* by the name of *John*, the court thought the proceedings irregular, and set them aside, as far as they respected *Bates*<sup>i</sup>.

But if the defendant be not in Middlesex, the plaintiff must sue out a writ of *latitat*<sup>k</sup>, or *testatum* bill of Middlesex, directed to the sheriff or sheriffs of the county where he is supposed to be, reciting the former process and its return, and suggesting that it is sufficiently *testified* the defendant lurks, and secretes himself in their county<sup>l</sup>. This writ may be issued in the first instance; and if it prove ineffectual, the plaintiff may sue out an *alias*, and after that (if necessary) a *pluries latitat*, or, more properly speaking, an *alias* or *pluries capias*<sup>m</sup>, (for these writs do not contain any *testatum*, or suggestion of a *latitat*); and the *pluries* may be repeated, from time to time, till the defendant be arrested, or served with a copy of it: though,

<sup>h</sup> Append. Chap. II. [D.]

<sup>i</sup> Append. Chap. II. [E.]

<sup>j</sup> 3 T. R. 660.

<sup>m</sup> *Id.* [F.]

<sup>k</sup> Trye, 99.

according

according to some books<sup>a</sup>, there must be a new *latitat*, after four terms from the time of suing out the first. In any of these writs, there may be a clause of *non omittas*, commanding the sheriff, that he do not *omit*, on account of any liberty in his county, but that he enter the same, &c.<sup>b</sup> It was formerly holden, that a writ of *latitat*, &c. did not run into *Wales*<sup>c</sup>, or the *counties palatine*<sup>d</sup>; but a different practice now prevails<sup>e</sup>: which practice is recognised, as to *Wales*, by the statute 13 Geo. III. c. 51.<sup>f</sup>; and with respect to the *counties palatine*, the true meaning of the expression *breve domini regis non currit*, &c. is said to be, that the court cannot write directly to the sheriff, as they do in other cases<sup>g</sup>.

The bill of Middlesex, and other process into that county, are issued out of the bill of Middlesex office, and signed by the clerk, but not sealed. The *latitat*, and other process thereon, are issued and signed by the signer of the writs, in the King's Bench office, and afterwards sealed

<sup>a</sup> Hanf. introd. 1. *Prac.* See also Heil. 18. Cro. Jac. ept. K. B. 2. *Tamen quere.* 484. 2 Bulst. 54. 156.

<sup>b</sup> Append. Chap. II. [G.] <sup>c</sup> Doug. 213.

<sup>d</sup> 1 Will. 193. <sup>e</sup> Id. in notis.

<sup>f</sup> T. Raym. 206. 1 Lev. <sup>g</sup> 2 Str. 1089. Andr. 191. 256, 291. 2 Saund. 193. S. C. S. C. See also 6 T. R. 71.

at the seal office\*. At the time of issuing them, the plaintiff's attorney should deliver to the officer a *præcipe*\*, or note of instructions; together with a *memorandum* or minute of his warrant, duly stamped". And it is usual to make the affidavit of the cause of action, at the same time, before the officer or his deputy.

In point of form, the bill of Middlesex and other process in trespass, are *common* or *special*: Before the making of the statute 13 Car. II. stat. 2. c. 2, a defendant might have been arrested, and holden to bail, for any sum of money, upon a *common* bill of Middlesex, *latitat*, &c. not expressing the particular cause of action. It consequently happened, that he was frequently arrested, and holden to bail or imprisoned, for a large sum of money, when perhaps there was no real plaintiff, or little or no cause of action\*. To remedy this mischief, it was enacted, that "no person arrested by any sheriff, " &c. by force or colour of any bailable writ,

\* Imp. K. B. tit. *Process*. were regularly made out, and It was formerly usual to seal filled up. R. 3d Apr. 1747.  
blank writs; but an inconvenience having attended this v Append. Chap. II. [H.]  
practice, it was ordered that \* 25 Geo. III. c. 80. § 13.  
for the future, no printed and see Append. Chap. II. [L.]  
blanks, or other writs, should \* See the preamble to the  
be sealed, before the same statute.

" bill,



"bill, or process, issuing out of this court,  
 "wherein the certainty and true cause of action  
 "is not expressed particularly, shall be com-  
 "pelled to give security for his appearance,  
 "in any penalty or sum of money, exceeding  
 "the sum of forty pounds".<sup>a</sup> And a rule of  
 court was made upon this statute, that no at-  
 torney should make any precept or writ, with a  
 clause of *ac-etiam*, &c. against any heir, exe-  
 cutor, or administrator, nor in any case where,  
 by the course of the court, special bail was not  
 required<sup>2</sup>. This statute, says Mr. Justice  
*Blackstone*<sup>3</sup>, (without any such intention in the  
 makers,) had like to have ousted the King's  
 Bench of all its jurisdiction over civil injuries  
 without force; for as the bill of Middlesex was  
 framed only for actions of trespass, a defendant  
 could not be arrested and holden to bail there-  
 upon, for breaches of civil contracts. But not-  
 withstanding this statute, the defendant might  
 still be arrested, and holden to bail, upon a  
 common bill of Middlesex, *latitat*, &c. for  
 any sum not exceeding forty pounds<sup>b</sup>. And  
 where it was for a larger sum, a method was  
 devised, to preserve the jurisdiction of the court,  
 and at the same time to authorize an arrest,

<sup>a</sup> Stat. 13 Car. II. stat. 2.

<sup>2</sup> 3 Blac. Com. 287.

c. 2.

<sup>b</sup> 1 H. Blac. 310.

<sup>2</sup> R. M. 15 Car. II. § 2.



by inserting in the process an *ac-etiam*, or special clause, expressing the true cause of action, in addition to the general complaint of trespass\*.

In *trespass*, and other cases, where the defendant either cannot, or is not meant to be arrested, and held to special bail, the process in general is in the *common* form, requiring the defendant to answer the plaintiff in a plea of *trespass*. This description of the plea however, though it was heretofore material<sup>d</sup>, is now considered as mere matter of form: Therefore, where a motion was made to stay the proceedings on a bill of Middlesex, which was in *debt* only, and not in *trespass*, with an *ac-etiam* in *debt*; the court ordered the bill to be amended, by inserting the plea of *trespass*<sup>e</sup>. In a subsequent case<sup>f</sup>, where the bill of Middlesex was to answer the plaintiff in a plea of *debt*, instead of *trespass*, and also to a bill to be exhibited in a plea of trespass upon the *case*, the court refused to grant a rule for setting it aside, on the authority of a case, which was read from the master's note book, exactly in point<sup>g</sup>.

Where the cause of action does not amount to 10*l.*<sup>h</sup>, or where it amounts to 10*l.* or upwards,

\* Trye, 102, 3. and see Append. Chap. II. [K.]

<sup>d</sup> 2 Str. 1072.

<sup>e</sup> 1 Blac. Rep. 262.

<sup>f</sup> 2 T. R. 513.

<sup>g</sup> M. 20 G. III. The same application was also refused in H. 24 G. III. 2 T. R. 513. (a).

<sup>h</sup> Stat. 5 G. II. c. 27. § 4. and

and no affidavit is made thereof<sup>1</sup>, an *English notice* must be written on the copy of the process, served on the defendant, of the intent and meaning of such service<sup>2</sup>; which in effect reduces it to a mere *summons*<sup>3</sup>. This notice must be directed to the defendant<sup>4</sup>; for if his name be not prefixed thereto, the process is irregular, and may be quashed on motion. And it should require the defendant to appear at the return of the process, though it happen on a Sunday<sup>5</sup>. But any trifling informality in the notice, as setting down the day of the *month*, on which the defendant is to appear, without saying *instant*, *next*, or specifying the *year*, will not invalidate it<sup>6</sup>.

Where the cause of action amounts to *ten pounds* or upwards, and an affidavit is made thereof, with intent to arrest the defendant, the process is *special*, with a clause of *ac-etiam*. And there are some cases, in which the cause of action must be expressed in the process, though the defendant be not arrested, and held to special bail thereon. Thus, in an action on the *lottery*

<sup>1</sup> 7 T. R. 337. Barnes, 404. Pr. Reg. 349. Cal. Pr. C. B. 100, 143. 1 Sel. Pr. 83. but see 1 Will. 22. *contra*.

<sup>2</sup> Append. Chap. II. [L.]

<sup>3</sup> Cowp. 455.

<sup>4</sup> Kelynge, 131. 1 Will. 104.

<sup>5</sup> 3 Bur. 1600.

<sup>6</sup> 2 Str. 1233. Barnes, 425.

act, the amount of the penalties sued for must be specified in the first process; even though the defendant be not holden to bail thereon<sup>p</sup>. And where a writ is sued out upon a recognizance of bail, it is necessary, by rule of court<sup>q</sup>, that after the words "*in a plea of trespass*," there should be inserted the following clause, "*and also to a bill of the said plaintiff, against the said defendant, in a plea of debt upon recognizance, according to the custom of our court, before us, to be exhibited*," otherwise the defendant or his attorney is not bound to accept of a declaration in debt upon such recognizance.

The plaintiff was formerly allowed to join four defendants, for separate causes of action, in one writ, and to declare against them severally<sup>r</sup>. And this is still allowed, where the process is not bailable<sup>s</sup>. But where the process is bailable, a plaintiff cannot now join several defendants in one writ, for distinct causes of action<sup>t</sup>. And if

<sup>p</sup> 4 T. R. 349. 577. *self to be exhibited.*  
<sup>q</sup> 6 T. R. 617.

<sup>r</sup> Com. Rep. 74. 4 T. R.

<sup>s</sup> R. E. 15 G. II. This rule

696.

applies to the form of the *latitat*, and other subsequent process. In the bill of Middlesex, the form is, "*in a plea, &c. according to the custom of the court of the lord the king, before the king him-*

<sup>t</sup> *Yardley v. Burgess*, T. 32 G. III. 4 T. R. 697.

<sup>u</sup> *Holland v. Johnson*, 4 T. R. 695. *Holland v. Richards*, T. 32 G. III. 4 T. R. 697.

the plaintiff hold two defendants to bail, on a joint writ, and declare against them severally, the court will set aside all the proceedings\*.

The bill of Middlesex, being merely a *precept*\*, has no direction or teste. But the writ of *latitat*, and other subsequent process, should be directed to the sheriff, or sheriffs of the county, where defendant is supposed to be; or, if the sheriffs be parties, to the *coroners*\*, and if they also be parties, to *elisors* named by the master\*. In a county palatine, or cinque-port, where the court cannot write directly to the sheriff\*, the *process* should be directed to the proper officer, as in *Durham*, to the *Bishop*, or his chancellor, in *Cheeshire*, to the *chamberlain*, or his deputy, in *Lancashire*, to the *chancellor*, or his deputy; and in a *cinque-port*, to the *constable* of Dover-castle, his deputy or lieutenant. In these cases, the mandatory part of the writ is different from the common form\*, and if the officer, to whom it is directed, refuse to receive it, he is liable to an attachment\*.

The *latitat*, and other subsequent process, should be tested in the name of the chief-justice, or senior judge of the court, if there be no chief

\* 5 T. R. 722.

\* *Ant.* 33.

\* 1 Blac. Rep. 506.

\* Imp. K. B. 137.

\* 2 Str. 1089. Andr. 190.

S. C. 6 T. R. 71.

\* Append. Chap. II. [M.]

\* 2 Str. 1089.

justice;



justice, and it may be tested before the cause of action<sup>b</sup>. If it be sued out in *term* time, it is usually tested on the first day of that term; and, if sued out in vacation, on the last day of the preceding one<sup>c</sup>: for if tested in vacation, it is altogether void<sup>d</sup>.

The *terms* are those times or seasons of the year, which are set apart for the dispatch of business, in the *superior* courts of common law. The history of these terms is given by Sir *Henry Spelman*<sup>e</sup>, who has clearly and learnedly shewn, that they were gradually formed from the canonical constitutions of the church; being indeed no other than those leisure seasons of the year, which were not occupied by the great festivals or fasts, or which were not liable to the general avocations of rural business. There are four terms in the year; which are called, from some festival or saint's day, preceding their commencement, the terms of Saint *Hilary*, of *Easter*, of the Holy *Trinity*, and of Saint *Michael*. *Hilary* term begins on the octave of Saint Hilary, or the eighth day inclusive after the feast day of that saint, which falling on the 13th of January, the

<sup>b</sup> 2 Bur. 967.

2588. 2 Blac. Rep. 683.

<sup>c</sup> 3 Keb. 214. T. Jbn.

S. C.

149. 1 Vent. 363. 2 Bur.

<sup>e</sup> *Jan. Ang.* l. 2. § 9. and

962.

see 3 Blac. Com. 275.

<sup>d</sup> 2 Bur. 954, 967. 3 Bur.



octave therefore, or first day of Hilary term, is the 20th of January; and it ends on the 12th of February following, unless it happen on a Sunday, and then on the 13th of February. *Easter* terms begins in fifteen days of Easter, being the *Sunday* fortnight after that festival; and ends on *Monday* before Whitsunday. *Trinity* term, which was abridged by the statute 32 Hen. VIII. c. 21. begins on the morrow of the Holy Trinity, being the *Monday* next after Trinity Sunday; and ends on the *Wednesday* fortnight after, unless it happen on the 24th of June, and then on the day following. *Michaelmas* term, which was abridged by the statute 16 Car. I. c. 6., and still further by the 24 Geo. II. c. 48., begins on the morrow of All Souls, being the 3d of November, except it be on a *Sunday*, and then on the next day; and ends on the 28th of November following, if not a *Sunday*, otherwise on the 29th. Of these terms it may be observed, that *Michaelmas* and *Hilary* are *fixed* terms, and invariably begin on the same day of the year; but *Easter* and *Trinity* terms are *moveable*, their commencement being regulated by the feast of Easter. After *Hilary* and *Trinity* terms, the judges go their *circuits*, for the trial of causes, wherein issues have been previously joined; and hence they are called *issuable* terms.

In

In each of these terms, there are stated days, called *general* or *common* return days; of these there are *four* in each term, except *Easter*, which has five. In *Hilary* term, the general or common return days are, in eight days of Saint Hilary, in fifteen days of Saint Hilary, on the morrow of the Purification, and in eight days of the Purification. In *Easter* term, they are, in fifteen days of Easter, in three weeks after Easter, in one month after Easter, in five weeks from Easter-day, and on the morrow of the Ascension. In *Trinity* term, they are, on the morrow of the Holy Trinity, in eight days of the Holy Trinity, in fifteen days of the Holy Trinity, and in three weeks after the Holy Trinity. And in *Michaelmas* term, they are, on the morrow of All Souls, on the morrow of Saint Martin, in eight days of Saint Martin, and in fifteen days of Saint Martin<sup>f</sup>. Some of these return days happen on a *Sunday*; and anciently, when writs were formed, courts of justice did actually sit on that day: but that practice having been long disused, it is now held, that an appearance cannot be entered, nor any judicial act done, or supposed to be done, by the court, till the *Monday*<sup>g</sup>.

<sup>f</sup> For a table of the *terms* 2 Salk. 627. 6 Mod. 250. and *returns*, see Append. 3 Bur. 1596. 1 Blac. Rep. Chap. II. [N.] 496, 526. S. C.

<sup>g</sup> Registr. 19. W. Jon. 156.

On one or other of these return days, all *original* writs, and process thereon, must be made returnable, *ubicunque*, &c. or wheresoever the king shall then be in *England*. The first general return day of the term is usually called the *essoin-day* of that term; and formerly, when essoins were allowed in personal actions, if the defendant did not appear, or cast an essoin on that day, the plaintiff on the next day might have entered an exception, and obtained an order that his essoin should not be received<sup>a</sup>; and from this exception, so taken and entered, the second day after the return of the writ was called the *day of exception*. The third day, the sheriff returned his writs into court, which were delivered to the *custos brevium*, and from thence this day was called the *day of returna brevium*; and then it was that the court was seised of the cause, by possession of the writ. The fourth day was called the *appearance day*, or *dies amoris*<sup>b</sup>, which was the day given *ex gratia curiæ* for the defendant's appearance. And this, which is denominated the *quarto die post*, is now the first day in *full term*, on which the court sits for the dispatch of business, except in *Trinity term*, when the court, by act of parliament, does not sit till the *fifth* day; or except in *Michaelmas term*, when the morrow of All Souls falls on a *Sunday*,

<sup>a</sup> Gilb. C. P. 13.<sup>b</sup> Co. Lit. 105. a.

in which case they sit on the *third* day<sup>2</sup>. The *Exchequer* opens eight days before any term begins, except Trinity, before which it opens only four days; and the first and last days of every term are days of appearance.

A bill of *Middlesex* may be stated in pleading, to have been sued out of the court at *Westminster*, on a day between the *essoins*-day, and the *quarto die post*; for though the courts do not actually sit on the *essoins* day, yet in law it is considered as the first day of the term<sup>1</sup>. And this, and every other process by bill, must be made returnable on a *particular* return-day, or day *certain*, in term time<sup>3</sup>; as on *Monday*, or some other day of the week, *next after* the preceding general return; and it may be made returnable on the general return, by specifying the day of the week on which it falls, as on *Monday* in eight days of Saint Hilary, &c.<sup>4</sup> But it must not be returnable on a *dies non juridicus*; as on a *Sunday*, the feast of the *Purification* in Hilary term, *Ascension-day* in Easter term, or *Midsummer-day* (if it happen) in Trinity term, unless it be on the *Friday* next after Trinity Sunday, in which case it is *dies juridicus* by the 32 Hen. VIII. c. 21.<sup>5</sup>

<sup>2</sup> *Ante*, 43.

<sup>1</sup> 3 T. R. 183.

<sup>3</sup> 1 Str. 399.

<sup>4</sup> *Append.* Chap. II. [N.]

<sup>5</sup> 2 Inst. 264, 5. 7 Mod.

17. 6 Mod. 252. 1 Blac.

Rep. 529. and see R. T.

35 Geo. III.



It should also be observed, that as there are more than seven days, between the morrow of All Souls and the morrow of Saint Martin, in Michaelmas term, the day before the morrow of Saint Martin, being the 11th of November, is not the day of the week *next* after the morrow of All Souls; and therefore on this day, the bill of *Middlesex*, or other process, should be made returnable on *Monday* (or other day of the week, being) *the feast of Saint Martin*.

In all *original* writs, there should be *fifteen* days at least between the teste and return; and formerly it was necessary, that there should be the same number of days between the teste and return of all *judicial* writs founded thereon. But as that occasioned great delay, it was enacted by the statute 13 *Car. II.* stat. 2. c. 2. §. 6. that "in all actions of *debt*, and other *personal* actions, and also in all actions of *ejectment*, depending by original writ, in the courts of King's Bench and Common Pleas, after any issue joined to be tried by a jury, or any judgment obtained in either of the courts aforesaid, there need not be fifteen days between the teste and return of any writ of *venire facias*, *habeas corpora juratorum*, or *distringas juratores*, *feri facias*, or *capias ad satisfaciendum*; nor shall the want thereof be assigned for error." But this statute does not extend



extend to any writ of *capias ad satisfaciendum*, whereon a writ of *exigent* after judgment is to be awarded, nor to any *capias ad satisfaciendum* against the defendant, in order to make his bail liable. And there is no necessity for any particular number of days, between the teste and return of a *latitat*, or other process by bill: even one was formerly deemed sufficient<sup>p</sup>, and it may be now sued out, on the very return day<sup>q</sup>.

It will here be proper to take notice of some things that are required, by act of parliament, to be set down, subscribed to, or indorsed upon the process<sup>r</sup>. And *first*, by the statutes 5 & 6 W. & M. c. 21. § 4. and 9 & 10 W. III. c. 25. § 42. made for preventing abuses committed by arresting persons, without any writ or legal process to justify the same, and by that means evading the stamp duties thereon; “the officer, who shall sign any  
“ writ or process, to arrest any person or persons  
“ before judgment, shall, at the signing thereof,  
“ set down upon such writ or process, the day  
“ and year of his signing the same.” And

<sup>p</sup> 2 Str. 917. 2 Barnardist.  
K. B. 60. S. C.

<sup>q</sup> 4 T. R. 610. but see  
2 Ld. Raym. 772. 2 Salk.  
421. 7 Mod. 12. S. C.

<sup>r</sup> These things are not  
peculiar to the process in  
*trespass*, but equally apply  
to the process by *attachment*  
of privilege, or *original writ*.

by a subsequent statute, made for the like purposes, "every warrant, issuing upon any such writ or writs, shall have the same day and year, plainly and distinctly set down thereon, as shall be so set down on the writ itself."

The indorsement of the *date* is said to be no part of the writ, and therefore, if the *teste* be right, the court will not set aside the proceedings, for a mistake of the indorsement. But where, in an action against an attorney for negligence, in not proceeding to judgment and execution in due time, the bill of Middlesex against the original defendant (having no *teste*) was stated, under a *videlicet*, to have issued on the 24th of January 1785, returnable on Monday next after fifteen days of St. Hilary in the same year, which was really the fact; but by a mistake of the indorsement, it appeared in evidence to have issued on the 24th of January 1784; the plaintiff was nonsuited: and on a motion for a new trial, the court were all of opinion, that the time of proceeding against the original defendant depending on the return of the writ, the *return* became material, and therefore the variance was fatal.

\* 6 G. I. c. 21. § 54.

† 1 Wils. 91.

" 1 T. R. 656.

E

Secondly,

*Secondly*, by the statute 12 Geo. I. c. 29. § 2.  
 “ the sum or sums, specified in the affidavit  
 “ of the cause of action, shall be indorsed on  
 “ the back of the writ or process; for which  
 “ sum or sums so indorsed, the sheriff or other  
 “ officer shall take bail, and for no more.”  
 This statute, however, is merely *directory* to  
 the sheriff; and does not avoid the process,  
 where the sum sworn to is not indorsed upon  
 it<sup>v</sup>.

*Thirdly*, by the statute 2 Geo. II. c. 23. § 22.  
 “ every writ and process, for arresting the  
 “ body, and every writ of execution, or some  
 “ label annexed to such writ or process, and  
 “ every warrant that shall be made out thereon,  
 “ shall, before the service or execution thereof,  
 “ be subscribed or indorsed with the name of  
 “ the attorney, clerk in court, or solicitor,  
 “ written in a common legible hand, by whom  
 “ such writ, &c. respectively shall be sued  
 “ forth: and where such attorney, &c. shall not  
 “ be the person *immediately* retained or em-  
 “ ployed by the plaintiff, then also with the  
 “ name of the attorney, &c. so *immediately* re-  
 “ tained or employed, to be subscribed or  
 “ indorsed and written in like manner. And  
 “ that every *copy* of any writ or process, that

<sup>v</sup> 1 Bur. 330. Barnes, 414. 1 H. Blac. 76.

" shall be served upon any defendant, shall,  
 " before the service thereof, be in like manner  
 " subscribed or indorsed, with the name of the  
 " attorney or solicitor, who shall be *immediately*  
 " retained or employed by the plaintiff."

But, by the statute 12 Geo. II. c. 13. § 4.  
 " the not subscribing or indorsing the name of  
 " the attorney, &c. on any warrant, that shall be  
 " made out upon any writ, &c. shall not vitiate  
 " the same; but such writ, &c. and all proceed-  
 " ings thereon, shall be as valid and effectual,  
 " notwithstanding such omission, as if the last-  
 " mentioned act had not been made: provided  
 " the writ, whereon such warrant is made out,  
 " be regularly subscribed or indorsed, according  
 " to the act." Since the making of this statute,  
 though the omission of the attorney's name upon  
 the *warrant*, which is the act of the sheriff, will  
 not vitiate the proceedings<sup>a</sup>, yet, if it be not  
 subscribed to or indorsed on the writ or *copy*<sup>a</sup>,  
 they may be set aside for irregularity.

If the process be defective in point of form<sup>a</sup>,  
 or in its direction<sup>a</sup>, teste<sup>a</sup>, or return<sup>b</sup>, or the at-

<sup>a</sup> Barnes, 414.

Barnes, 422.

<sup>a</sup> *Id.* 415. *Wright* and an-  
 other v. *Willes*, M. 21 G. III.  
*Per Cur.* T. 29 G. III.

<sup>a</sup> 3 T. R. 660.

<sup>a</sup> 1 Blac. Rep. 506.

<sup>a</sup> 2 Bur. 954, 967. 5 Bur.  
 2588. 2 Blac. Rep. 683.  
 S. C. Barnes, 407, 8, 9,  
 420.

<sup>b</sup> 1 Str. 399.

torney's name be not indorsed upon it<sup>e</sup>, or if there be no notice to appear<sup>d</sup>, (when necessary,) or the notice be not properly directed<sup>e</sup>, &c. the defendant may move the court to set aside the proceedings. But he cannot take advantage of any error or defect in the process, after he has appeared to it<sup>f</sup>, or taken the declaration out of the office<sup>g</sup>. And, in general, the process may be *amended*, where there is any thing to amend by<sup>h</sup>.

<sup>e</sup> *Wright and another v. Willes*, M. 21 G. III. Per 167, 415.

*Cur.* T. 29 G. III. Barnes, 415. <sup>f</sup> *Cal. temp. Hardw.* 242.

<sup>g</sup> 2 Str. 1072.

<sup>h</sup> 2 Str. 1072. *Wright and another v. Willes*, M. 21 G. III.

<sup>i</sup> *Kelynge*, 131. 1 Will.

<sup>j</sup> 1 T. R. 782.



## C H A P. III.

*Of the*

## DOCTRINE OF ARREST.

**A**T common law, the defendant was not liable to be arrested, for civil injuries unaccompanied with force\*. This immunity of the defendant's person, in case of peaceable though fraudulent injuries, producing great contempt of the law, in indigent wrong-doers, a *capias* was allowed to arrest the person, in actions of *account*, though no breach of the peace were suggested, by the statutes of *Mari-bridge*, 52 Hen. III. c. 23. and Westm. 2. (13 Edw. I.) c. 11. in actions of *debt* and *detinue*, by statute 25 Edw. III. c. 17. and in all actions on the *case*, by statute 19 Hen. VII. c. 9.<sup>b</sup>

There are certain persons, however, against whom a *capias* does not lie, upon the above statutes, and who are therefore not liable to be arrested in civil actions. Thus, not to mention the *royal family*\*, it is holden that the *servants in ordinary* of the king or queen *regent*, ought not

\* 3 Co. 12.

\* 2 Inst. 30.

<sup>b</sup> 3 Blac. Com. 281.

to be arrested, even upon process of execution<sup>d</sup>, without notice first given to, and leave obtained from the lord chamberlain of his majesty's household<sup>e</sup>. But the servants of the queen *consort* or *dowager* have no such privilege<sup>f</sup>.

By the law of nations, as *declared* by the statute 7 Ann. c. 12. *Ambassadors*, and other *public ministers*<sup>g</sup>, are privileged from arrest; as are also their domestic servants; it being enacted, by the above statute, that "all writs and "process against the person or goods of an "ambassador, or other *public minister* of a "foreign prince or state, or the *domestic servant* "of such ambassador or public minister, shall be "utterly null and void, to all intents and purposes "whatsoever." But it has been adjudged<sup>h</sup>, that a defendant, claiming the benefit of this act, as domestic servant to a public minister, must be really and *bonâ fide* his servant, at the time of the arrest; and must clearly shew by affidavit, the general nature of his service, the actual performance of it, and that he was not a trader or

<sup>d</sup> 5 T. R. 686.

<sup>e</sup> T. Raym. 152. 2 Keb. 3, 485.

<sup>f</sup> 1 Keb. 842, 877.

<sup>g</sup> Cas. temp. Talb. 281.

<sup>h</sup> Bur. 2016.

<sup>i</sup> 2 Str. 797. 2 Ld. Raym.

1524. Fitzgib. 200. S. C.

1 Wils. 20, 78. 1 Blac. Rep.

48. 1 Bur. 401. 3 Bur.

1478. 1 Blac. Rep. 471. S. C.

3 Bur. 1676, 1731. 3 Wils.

33.

object of the bankrupt laws<sup>1</sup>. For, by the law of nations, a public minister cannot protect a person who is not *bona fide* his servant. It is the law that gives the protection: and though the process of the law shall not take a *bona fide* servant out of the service of a public minister, yet, on the other hand, a public minister shall not take a person, who is not *bona fide* his servant, out of the custody of the law, or screen him from the payment of his just debts<sup>2</sup>.

This privilege, however, has been long settled to extend to the servants of a public minister, being *natives* of the country where he resides, as well as to his *foreign* servants<sup>3</sup>; and not only to servants lying in his house, for many houses are not large enough to contain and lodge all the servants of some public ministers, but also to real and actual servants lying out of his house<sup>4</sup>: Nor is it necessary, to entitle them to the privilege, that their names should have been registered in the secretary of state's office, and transmitted to the sheriff's office<sup>5</sup>; though, unless they have been so registered and transmitted, the sheriff or his officers cannot be proceeded against for arresting them<sup>6</sup>. And it

<sup>1</sup> See the statute, § 5.

<sup>2</sup> 4 Bur. 2016, 17.

<sup>3</sup> 3 Bur. 1676.

<sup>4</sup> 2 Str. 797. 3 Wils. 35.

<sup>5</sup> 4 Bur. 2017. 3 T. R. 79.

<sup>6</sup> See the statute, § 5.

<sup>7</sup> Wils. 20. and a late order.

Is not to be expected, that every particular act of the service should be specified. 'Tis enough if an actual *bona fide* service be proved: And if such a service be sufficiently made out by affidavit, the court will not, upon bare suspicion, suppose it to have been merely colourable and collusive<sup>1</sup>.

By the common law, *Peers* of the realm of *England*<sup>2</sup>, and *Peereffes*, whether by birth or marriage<sup>3</sup>, are constantly privileged from arrest in civil suits, on account of their dignity, and because they are supposed to have sufficient property, by which they may be compelled to appear; which privilege is extended, by the act of union<sup>4</sup>, to *peers* and *peereffes* of *Scotland*. And they are not liable to be *attached*, for the non-payment of money, pursuant to an order of *nisi prius*, which has been made a rule of court<sup>5</sup>. But this privilege will not exempt them from *attachments*, for not obeying the process of the court<sup>6</sup>;

<sup>1</sup> 4 Bur. 1481.

<sup>2</sup> 6 Co. 52. Sty. Rep. 222.

<sup>3</sup> Salk. 312.

<sup>4</sup> 6 Co. 52. Sty. Rep. 252.

<sup>5</sup> Vent. 298. 2 Chan. Caf.

<sup>6</sup> 224.

<sup>7</sup> 5 Ann. c. 8. art. 23. and

see Fort. 165. 2 Str. 990.

<sup>8</sup> Ld. Falkland's case, E.

36 G. III. 7. T. R. 171.

But it seems, that if bailable process be taken out against a *peer*, the sheriff is not a trespasser for executing it: Doug. 671.

<sup>9</sup> 1 Will. 332. Say. Rep. 50.

S. C. 1 Bur. 631.



nor does it extend to *Irish* or other *foreign* peers<sup>v</sup>, or to peeresses by marriage, if they afterwards intermarry with commoners<sup>w</sup>. And though the *servants of peers*, necessarily employed about their persons and estates, could not formerly have been arrested<sup>x</sup>, yet this privilege seems to have been taken away by the statute 10 Geo. III. c. 50.<sup>y</sup>

By the law and custom of parliament, *Members of the house of commons*<sup>z</sup> are privileged from arrest, not only during the actual sitting of parliament, but for a convenient time, sufficient to enable them to come from, and return to, any part of the kingdom, before the first meeting, and after the final dissolution of it; and also for *forty days*<sup>a</sup> after every prorogation, and before the next appointed meeting; which is now in effect as long as the parliament exists, it being seldom prorogued for more than fourscore days at a time<sup>b</sup>. And the court will not grant an attachment, against a member of the house of

<sup>v</sup> 2 Inst. 48. 3 Inst. 30.

<sup>x</sup> 5 T. R. 687.

7 Co. 15, 16.

<sup>y</sup> Stat. 10 Geo. III. c. 50.

<sup>w</sup> Co. Lit. 16. 2 Inst. 50.

<sup>z</sup> Str. 985. Fort. 159. Com.

4 Co. 118. Dy. 79.

Rep. 444. S. C.

<sup>a</sup> *Ordo dom. proc.* 28<sup>th</sup> Junii,

<sup>b</sup> 2 Lev. 72. 1 Chan. Chf.

1715. 1 Mod. 146. 2 Str.

221. S. C. but see 1 Sid. 29.

1065. 1 Will. 278.

<sup>b</sup> 1 Blac. Com. 165.

commons,



commons, for non-payment of money pursuant to an award<sup>c</sup>.

Members of *convocation* and their *servants* have, by statute<sup>d</sup>, the same privilege from arrest in coming, tarrying, and returning, as peers and members of the house of commons. And members of *corporations aggregate*<sup>e</sup>, and *hundredors*<sup>f</sup>, not being liable to a *capias*, cannot be arrested for any thing done in their corporate capacity, or on the statutes of hue and cry, &c.

*Attornies* and other *officers*, on account of the supposed necessity of their attendance, in order to transact the business of the court, are, generally speaking, privileged from arrest<sup>g</sup>. But the sheriff cannot take notice of their privilege<sup>h</sup>; nor is he bound to discharge them, even upon producing their writs of privilege, except where the arrest was by process issuing out of an *inferior* court, in which case their writs of privilege ought to be allowed *instanter*<sup>i</sup>. If an attorney or other officer of the King's Bench be arrested, by process issuing out of the *same*

<sup>c</sup> 7 T. R. 448.

<sup>d</sup> 8 Hen. VI. c. 1. 1 Eq. Cas. Abr. 349.

<sup>e</sup> Bro. tit. *Corporation*, 43.

<sup>f</sup> 3 Keb. 126, 7.

<sup>g</sup> 1 Mod. 10. but *vide*

*post*, ch. 13.

<sup>h</sup> Co. Lit. 131. 1 Salk. 1. and see Doug. 671.

<sup>i</sup> Cas. Pr. C. B. 2. 2 Blac. Rep. 1087.

court,

court, he may move to be discharged on common bail<sup>k</sup>. But an attorney or officer of a *different* court must find special bail, and plead his privilege in abatement<sup>l</sup>.

In all other cases, the defendant, being subject to a *capias*, was formerly liable to be arrested. And indeed, before the statute 12 Geo. I. c. 29. there was no other way of bringing him into court. But *common* bail was accepted in actions for *uncertain* damages<sup>m</sup>, and against *executors* and *administrators*, where they merely acted *en autre droit*, and had duly administered the effects of the deceased<sup>n</sup>. But where an executor or administrator hath personally promised to pay a debt or legacy<sup>o</sup>, he may be arrested on such promise. So he may be arrested in an action of debt on judgment,

<sup>k</sup> 1 Mod. 10. 2 Salk. 544.  
<sup>l</sup> 1 Will. 298.

<sup>1</sup> 2 Salk. 544. 2 Str. 864.  
<sup>2</sup> Ld. Raym. 1567. S. C.  
<sup>1</sup> Will. 306. And *note*, there are two ways of pleading an attorney's privilege, first with a *proffert* of a writ of privilege, or of an exemplification of the record of his admission; upon which, the plaintiff must reply *nul tiel record*, and cannot otherwise deny the defendant's being an attorney; secondly,

as a mere matter of fact, without a *proffert*, Lil. Ent. 3. and then a *certiorari* shall be awarded, to certify whether he be an attorney or not. 1 Ld. Raym. 336. 7 Mod. 106. 2 Salk. 545. 6 Mod. 305. 2 Ld. Raym. 1172. 1 Str. 76, 532.

<sup>m</sup> Gilb. C. P. 36, 7.

<sup>n</sup> Yelv. 53. 2 Brownl. 293. 3 Bulst. 316. R. M. 15 Car. II. Gilb. C. P. 37.

<sup>o</sup> 1 T. R. 716.

suggesting

suggesting a *devastavit*<sup>p</sup>; if it appear by affidavit, or the sheriff's return<sup>q</sup>, that he has *wasted* the effects of his testator or intestate.

In an action against *husband* and *wife*, the husband alone is liable to be arrested; and shall not be discharged, until he have put in bail for himself and his wife<sup>r</sup>. If the wife be arrested by *mesne* process, she shall be discharged on common bail; and that, whether she be arrested singly<sup>s</sup>, or jointly with her husband<sup>t</sup>. So in an action against the wife only, if it be clear and notorious that she is covert, and has no separate maintenance, common bail ought to be received<sup>u</sup>; but if her coverture be doubtful, or she has obtained credit as a *feme sole*<sup>v</sup>, she must find special bail. And where the wife is taken in *execution*, she shall not be discharged; unless it appear, that there is fraud and collu-

<sup>p</sup> 1 Sid. 63. 1 Lev. 39. <sup>q</sup> 1 Lev. 216. 1 Salk. 115.  
 Carth. 264. 1 Mod. 16. 6 Mod. 17. 2 Str. 1272.  
<sup>r</sup> 1 Salk. 98. Highmore on 1 T. R. 486. K. B. Barnes,  
*bail*, 10. 96. 3 Will. 124. 2 Blac.  
<sup>s</sup> Comb. 206, 325. Rep. 720. S. C. C. B.  
<sup>t</sup> 1 Vent. 49. 1 Mod. 8. <sup>u</sup> 6 Mod. 105. 7 Mod. 10.  
 81 C. 6 Mod. 17. 86. R. E. 6 T. R. 451.  
<sup>v</sup> 5 G. II. 1. (b) <sup>v</sup> *Wilson* against *Campbell*,  
<sup>w</sup> Cro. Jac. 445. Pr. Reg. M. 20 G. III. 5 T. R. 194.  
 65, 6. S. P.

sion, between the plaintiff and her husband, to keep her in prison<sup>u</sup>.

The *Parties* to a suit, and their *Witnesses*, are, for the sake of public justice, protected from arrest, in coming to, attending upon, and returning from, the court; or, as it is usually termed, *eundo, morando, et redeundo*<sup>v</sup>. Nor have the courts been nice in scanning this privilege, but have given it a large and liberal construction. Thus, where the defendant was attending his cause at the sittings, and though it was put off early in the day, stayed in court till five in the afternoon, and then went with his attorney and witnesses to dine at a tavern, where he was arrested during dinner; the court held, that such a necessary refreshment as this, ought not to be looked upon as a deviation, so as to cancel the defendant's privilege *redeundo*<sup>v</sup>. So where a witness, having attended a trial at Winchester assizes, which was over on Friday about four in the afternoon, was arrested on Saturday about seven in the evening, as she was going home in a coach to Portsmouth, the court held that she ought to be discharged, her

<sup>u</sup> 2 Str. 1167, 1237. P. R. 369. 1 Mod. 66.  
<sup>v</sup> 1 Will. 149. K. B. Barnes, S. C. 1 Vent. 11. Gilb.  
 203. 3 Will. 124. 2 Blac. C. P. 207, &c.  
 Rep. 720. S. C. C. B. 7 2 Blac. Rep. 1113.

<sup>w</sup> 2 Rol. Abr. 272. 2 Lil.

protection



protection not being expired; and that a little deviation or loitering would not alter it<sup>y</sup>. There is a case in the year books<sup>z</sup>, where a man was arrested in a town, which was forty miles out of his way, and yet was allowed his privilege; for perhaps, it is said, he went there to buy a horse, or other necessaries for his journey. But the sheriff is not bound to take notice of the privilege of a witness<sup>a</sup>: and the court will not discharge a person in custody by process of the sheriff's court, in a cause afterwards removed into this court, because he was arrested while attending *commissioners of bankrupt*, to prove a debt<sup>b</sup>.

In some of the preceding cases, the process is declared to be void; as against *ambassadors*, &c. and it may be remarked, in general, that where the defendant is entitled to privilege, as the arrest is irregular and unlawful, the court will discharge him upon motion, and not put him to the necessity of suing out a writ of privilege<sup>c</sup>.

<sup>y</sup> Gilb. Cas. K. B. 308.

<sup>z</sup> Str. 986. S. C. cited.

<sup>a</sup> Bro. tit. *Privilege*, 4.

<sup>a</sup> 2 Blac. Rep. 1190.

<sup>b</sup> 4 T. R. 377.

<sup>c</sup> 2 Str. 989. Fort. 159.

Com. Rep. 444. S. C.

5 T. R. 689. But see 1 Will. 278.



Before the making of the statute 12 Geo. I. c. 29. a defendant might have been arrested for any sum of money, however trifling or considerable, upon a mere suggestion, without any affidavit, of its being due. To remedy which, it was enacted by the said statute, *amended* by the 5 Geo. II. c. 27. made *perpetual* by the 21 Geo. II. c. 3. and extended to *inferior* courts by the 19 Geo. III. c. 70. that "in all cases, where the cause of action shall not amount to the sum of *ten pounds* or upwards, and the plaintiff or plaintiffs shall proceed by way of process against the person, he, she, or they, shall not arrest, or cause to be arrested, the body of the defendant or defendants; but shall serve him, her, or them, personally, within the jurisdiction of the court, with a copy of the process; upon which shall be written an English notice to such defendant, of the intent and meaning of such service; for which no fee or reward shall be demanded or taken: provided nevertheless, that in particular franchises and jurisdictions, the proper officer there shall execute such process."

"That in all cases, where the plaintiff's cause of action shall amount to the sum of *ten pounds* or upwards, an *affidavit* shall be  
"made

64 OF THE DOCTRINE OF ARREST.

“made and filed of such cause of action”;  
 “which affidavit may be made before any  
 “judge or commissioner of the court, out of  
 “which such process shall issue, authorised to  
 “take affidavits in such court, or else before  
 “the officer who shall issue such process, or  
 “his deputy; which oath such officer or his  
 “deputy are impowered to administer; and  
 “for such affidavit one shilling, over and  
 “above the stamp-duties, shall be paid, and  
 “no more: and the sum or sums, specified  
 “in such affidavit, shall be indorsed on the  
 “back of such writ or process; for which sum  
 “or sums, so indorsed, the sheriff or other  
 “officer, to whom such writ or process shall  
 “be directed, shall take bail, and for no  
 “more.”

“And that if any writ or process shall issue  
 “for the sum of *ten pounds* or upwards, and no  
 “affidavit and indorsement shall be made as  
 “aforesaid, the plaintiff or plaintiffs shall not  
 “proceed to arrest the body of the defendant

“ And by a late act of par- company of the Bank of Eng-  
 liament, it must be sworn, in land, expressed to be payable  
 the affidavit to hold to bail, on demand. Stat. 37 G. III,  
 that no offer has been made c. 91. § 8. and see 7 T. R.  
 to pay the sum sworn to, in 375, 6.  
 notes of the governor and

“ or

" or defendants, but shall proceed in like manner as is directed by the statute 12 Geo. I. in cases where the cause of action does not amount to the sum of *ten pounds* or upwards."

By these statutes, *three* cases are provided for; first, where the cause of action does not amount to ten pounds; secondly, where it amounts to ten pounds or upwards, and no affidavit is made thereof; thirdly, where it amounts to ten pounds or upwards, and there is an affidavit made and filed of the cause of action\*. In the two first cases, the defendant cannot be *arrested*, but must be personally served with a *copy* of the process; upon which there should be a *notice* to appear on the return day: In the last case, the defendant may in general be arrested, and holden to special bail. And the court will not discharge him out of custody on common bail, on the ground that he was *insane* at the time of the arrest<sup>1</sup>, or afterwards became so<sup>2</sup>; nor will they discharge his bail, on either of these grounds, although a commission of *lunacy* has issued against the defendant, under which he has been found a lunatic<sup>3</sup>. But by a statute<sup>4</sup> made pre-

\* Prac. Reg. 350.

<sup>1</sup> 4 T. R. 121.

<sup>2</sup> 2 T. R. 390.

<sup>3</sup> 6 T. R. 133.

<sup>4</sup> 11, 12 W. III. c. 9. § 2.

vious to, and not repealed or altered by the 12 Geo. I. c. 29.<sup>k</sup> "no sheriff shall hold any person to special bail, in *Wales* or the *Counties palatine*, upon any process issuing out of the courts at *Westminster*, unless an affidavit be first made and filed, of the cause of action, and that the same is twenty pounds and upwards; and bail shall not be taken for more than the single sum expressed in the affidavit."

With respect to the *cause* of action, it is a rule, upon the above statutes, that where there is a certain *debt* to the amount of ten pounds, or *damages* to that amount, which may be reduced to a certainty, as in *assumpsit* or *covenant* for the payment of money<sup>l</sup>, the defendant may be arrested, as a matter of *course*, on an affidavit shortly stating the cause of action. And he may be arrested in like manner, in an action of *trover*<sup>m</sup>; for this is more an action of property than a *tort*. But it is said<sup>n</sup>, that where the defendant, being a custom-house officer, was arrested in an action of *trover*, brought against him for seizing goods, and it appeared

<sup>k</sup> 2 Str. 1102.

Cowp. 529.

<sup>l</sup> Barnes, 79, 80.

<sup>n</sup> 2 Blac. Rep. 1018.

<sup>m</sup> 6 Mod. 14. 2 Str. 1192.

<sup>1</sup> Wilf. 335. Say. Rep. 53.

<sup>1</sup> Wilf. 23. S. C. <sup>1</sup> Wilf. 335. S. C. *Semb. contra*.

Say. Rep. 53. S. C. and see



by affidavit that there was a reasonable foundation for the seizure, that the goods were deposited in the king's warehouse, and that the defendant had used due diligence, in proceeding towards a condemnation in the exchequer, the court ordered common bail to be accepted.

On the other hand, where the damages are altogether *uncertain*<sup>o</sup>, as in *assumpsit* or *covenant* to indemnify, &c. or in actions for a *tort* or *trespass*, there can be no arrest, without a *special order* of the court or a judge, on a full affidavit of the circumstances; for it would be unreasonable that the defendant should be arrested, for what damages the plaintiff fancies he has sustained, and is pleased to swear to. And it is not usual to grant a special order, except where there has been an outrageous battery or mayhem<sup>p</sup>, or the defendant is about to quit the kingdom.

There are also some cases, where the defendant cannot be arrested, though the action be brought for a sum *certain*; and others, where he cannot be arrested for the whole of the *legal* debt, but only for so much as is *equitably* due. Thus, in an action of *debt* on a *penal* statute<sup>q</sup>, the defendant cannot be arrested, though it be for a

<sup>o</sup> Barnes, 108.

<sup>q</sup> Yelv. 53. Gilb. C. P.

<sup>p</sup> R. M. 1654, § 9.



sum certain, as it is a maxim, that every man shall be presumed innocent of an offence, till he be found guilty: But where an action is brought on a *remedial* statute, as for money won at play<sup>1</sup>, or on a statute which expressly authorises an arrest, as for exporting wool<sup>2</sup>, double rent<sup>3</sup>, having unsealed wrought silks<sup>4</sup>, or insuring lottery tickets<sup>5</sup>, &c. the defendant may be arrested. So, in an action of debt upon a *recognizance* of bail, the defendant cannot be arrested, for the sufficiency of the bail must have been proved, or admitted, previous to their being allowed, and if the defendant were arrested in such an action, there would be bail *in infinitum*. And for similar reasons, an arrest is not permitted in an action of debt upon a *bail*<sup>6</sup> or *replevin*<sup>7</sup> bond, whether the action be brought in the name of the sheriff<sup>8</sup>, or of his assignee.

A party cannot be arrested and held to bail for a *penalty*, but only for the sum secured by it<sup>9</sup>. And hence it is, that in an action of debt upon

<sup>1</sup> 9 Ann. c. 14. 2 Str. 1079.  
<sup>7</sup> T. R. 259. But see 2 Will.  
 67.

<sup>2</sup> 10, 11 W. III. c. 10.  
<sup>5</sup> 20. Com. Rep. 75.

<sup>3</sup> 4 Geo. II. c. 28. 5 T. R.  
 364.

<sup>4</sup> 26 Geo. II. c. 21. 3 Bur.  
 1369.

<sup>6</sup> 27 Geo. III. c. 1.

<sup>8</sup> R. M. 8 Ann. (c)

<sup>9</sup> 1 Salk. 99.

<sup>1</sup> 6 T. R. 336.

<sup>2</sup> *Id.* 217.

bond, conditioned for the *payment of money*, though the penalty is, strictly speaking, the legal debt, yet as it is now considered, upon the statute for *the amendment of the law*<sup>a</sup>, to be merely a security for principal interest and costs, the defendant cannot be arrested for more than the sum really due by the condition. And, in like manner, where the bond is conditioned for the *performance of covenants*<sup>b</sup>, or *to save harmless, &c.* the defendant ought not to be arrested for the penalty, but only for the amount of the damages, really sustained by the breach of the condition. He may be arrested, however, for the penalty of a bond conditioned for the performance of a *promise of marriage*<sup>c</sup>, &c. where the penalty is the real debt, or rather in nature of stated damages.

Where there have been *mutual* dealings between the parties, the *balance* is considered as the debt at law as well as in equity: and, therefore, upon an unliquidated account, if the plaintiff were to swear to the sum due to him, on the debtor side only, it would be looked upon as a mere evasion; and if not ground enough to support an indictment for perjury, would at least

<sup>a</sup> 4, 5 Ann. c. 16. § 13. Doug. 449.

<sup>b</sup> 1 Sid. 63. 1 Salk. 100. <sup>c</sup> 1 Will. 59. 3 Bur. 1351.  
Barnes, 109. Say. Rep. 109. 1373. Doug. 449.

entitle the defendant to an action upon the case, for a malicious arrest<sup>d</sup>.

The *affidavit* required by the statutes, of the cause of action, may be made by the plaintiff, his wife, or a third person; and sworn before a commissioner, although he be concerned as attorney for the plaintiff<sup>e</sup>. But it must be made by some person who is legally competent to be a witness; and therefore it is bad, if made by a person convicted of felony, or other infamous crime<sup>f</sup>. There being no action depending in court, at the time when the affidavit is made, it ought not regularly to be *intituled* in a cause; and in one case, the court discharged the defendant out of custody on common bail, on account of its being so *intituled*<sup>g</sup>. But in a subsequent case<sup>h</sup>, they thought that as the practice had obtained so long, of adding a title to affidavits of this kind, it would be too much to determine, that such practice had been erroneous; particularly as this was a mere question of form, and did not interfere with the justice of the case: but a rule of court has been since made, that affidavits of any

<sup>d</sup> Dr. *Turlington's* case, Barnes, 79. 2 Str. 1148.

<sup>4</sup> Bur. 1996.

<sup>2</sup> Willf. 225.

<sup>e</sup> R. E. 15 G. II. B. R. 2.      <sup>8</sup> 6 T. R. 640. and see R. E. 13 G. II. C. B. But Say. Rep. 218.

see Barnes, 37. C. B. *contra*.      <sup>h</sup> 7 T. R. 321.

<sup>f</sup> 5 Mod. 74. 2 Salk. 261.

cause of action, before process sued out to hold defendants to bail, be not *intituled* in any cause, nor read if filed<sup>1</sup>. It is no objection to an affidavit to hold to bail, that it is not intituled *in the King's Bench*; or that it appears to have been taken before A. B. a *commissioner*, &c. without adding *of the court of King's Bench*, if in fact he were a commissioner of that court<sup>2</sup>.

An affidavit made *abroad*, out of the king's dominions, will not be received here<sup>1</sup>. But the court will take cognizance of affidavits sworn in *Scotland* or *Ireland*, or elsewhere in the king's dominions, if properly authenticated, by proof of the handwriting of the persons before whom they are sworn, and of their being such officers as are authorised to take the same<sup>m</sup>. Such affidavits ought to contain all the requisites that are essential to affidavits for holding to bail in *England*; and therefore it was deemed necessary to state in an affidavit made in *Ireland*, for the purpose of arresting the defendant in this country, that he had not made a tender of the money in bank notes<sup>n</sup>.

<sup>1</sup> R. M. 38 Geo. III. 36 G. III. 7 T. R. 251.  
7 T. R. 454. 1 Sel. Pr. 117.

<sup>2</sup> 7 T. R. 451.

<sup>n</sup> *Nesbitt v. Pym*, 7 T. R.

<sup>1</sup> 2 Str. 1209. 2 Bur. 655. 376. *in notis*.

<sup>m</sup> *Per Lord Kenyon*, T.



In point of *form*, the affidavit should be *direct* and *positive*, that the plaintiff has a *subsisting* cause of action; and therefore, if it be merely by way of *argument*<sup>o</sup>, or *reference* to books or accounts, &c. or as the party making it *believes*, it will not in general be sufficient<sup>p</sup>. But an affidavit, that the defendant is indebted to the plaintiff in such a sum, *as he computes it*, has been adjudged good<sup>q</sup>. And where the plaintiff sues as *executor* or *administrator*, or as *assignee* of a bankrupt, it is sufficient for him to swear, that the defendant is indebted, &c. *as appears by books, &c. and as he verily believes*<sup>r</sup>: but even in that case, a mere *reference* to books, &c. unsupported by the party's *belief*, is not sufficiently positive<sup>s</sup>. The *assignee* of a bond swore, that the obligor was indebted in ninety pounds, for principal and interest upon the bond, *as he believed*, and it was deemed sufficient, to hold the defendant to special bail<sup>t</sup>: But it is usual, in such case, for the obligee and assignee to join in an affidavit, stating

<sup>o</sup> 5 T. R. 364.

<sup>p</sup> 2 Str. 1157, 1209, 1219, 1226, 1270. 1 Will. 121, Chap. III.

231, 279, 339. Say. Rep. <sup>q</sup> 2 Bur. 1032.

59. S. C. 2 Bur. 655. <sup>r</sup> 4 Bur. 1992, 2283.

3 Bur. 1447, 1687. 4 Bur. 1 T. R. 83. 4 T. R. 176.

2126. 1 T. R. 716. 2 T. R. <sup>s</sup> 2 Str. 1219. 1 T. R. 83.

55. 3 T. R. 575. For the <sup>t</sup> 1 Will. 232.



the execution of the bond; the assignment of it, and how much is due for principal and interest.

It is also requisite, that the *nature* of the cause of action should be stated in the affidavit, with *certainty* and *precision*. Therefore an affidavit that the defendant is indebted to the plaintiff in such a sum upon *promises*", or in so much upon a bond for *performance of covenants*", or upon *breach of articles*", has been holden to be too general. An affidavit to hold to bail for *stipulated* damages, for not performing an agreement, must state a breach of the agreement<sup>2</sup>. And as a party cannot be held to bail for a *penalty*, but only for the sum secured by it, an affidavit stating "that the defendant was indebted to the plaintiff in 1000 l. under an agreement in writing, whereby the defendant undertook to pay the plaintiff the balance of accounts, &c. which balance is still due and unpaid," is insufficient, without stating that the balance was 1000 l.<sup>3</sup> So where an affidavit stated, that the defendant was indebted to the plaintiff in 245 l. for money lent by plaintiff to defendant, for the use of another, and for which the defendant promised to be accountable, and to repay or cause to be paid or *secured* to the plaintiff, &c., the defendant was

<sup>2</sup> Doug. 467.

<sup>3</sup> Say. Rep. 109.

<sup>4</sup> *Booker v. Friend*, cited

in Say. Rep. 109.

<sup>5</sup> 6 T. R. 13.

<sup>6</sup> *Id.* 217.

discharged

discharged on common bail; it not appearing in the affidavit, but that the money had been secured, according to the agreement <sup>z</sup>.

In *trover*, it is too uncertain to swear, that the defendant *now has, or lately had in his possession*, goods, &c. of the plaintiff; but the affidavit should state, that he has *possessed* himself of goods, &c. which he has unlawfully converted to his own use <sup>a</sup>: And in order to hold to bail in *trover*, for a bill of exchange, it should be stated that the bill remains unpaid <sup>b</sup>. An affidavit to hold to bail on the *lottery* act, must specify the nature of the offence, and aver that the defendant has incurred the forfeiture <sup>c</sup>; but the offence need not be described circumstantially, nor is the plaintiff obliged to swear, that the defendant is indebted to him in the amount of the penalty <sup>d</sup>. In such an affidavit, several offences of the same nature may be included <sup>e</sup>; and it need not state that the defendant received any consideration for making the insurances, or set out the plaintiff's authority to bring the action <sup>f</sup>. Lastly, it is a general rule, that the affidavit to hold to bail should be *single*; and therefore if it contain two or more

<sup>z</sup> 5 T. R. 552.

<sup>a</sup> *Per Cur. E.* 37 G. III.

<sup>b</sup> 7 T. R. 321.

<sup>c</sup> 1 T. R. 705.

<sup>d</sup> 2 T. R. 654.

<sup>e</sup> 4 T. R. 228.

<sup>f</sup> 6 T. R. 640.

different

different causes of complaint, that cannot be joined in the same action, either at the suit of one or several plaintiffs<sup>s</sup>, or against one<sup>a</sup> or several<sup>t</sup> defendants, it is irregular, and the court on motion will set aside the proceedings.

If there be *no* affidavit, or if the affidavit be *defective*<sup>k</sup>, or not duly *filed*<sup>l</sup>, or if the sum sworn to be not *indorsed* on the writ<sup>m</sup>, the court will discharge the defendant upon common bail. But if the affidavit be merely informal, the defendant cannot object to it, after he has *voluntarily* given a bail bond<sup>n</sup>, taken the declaration out of the office<sup>o</sup>, or pleaded to the action<sup>p</sup>. And it is a rule, that the court will not go out of the affidavit, or prejudge the cause, by entering into the merits upon which it is founded<sup>q</sup>. The plaintiff therefore must stand or fall by his affidavit; it being the constant and uniform practice of this court, in cases of arrest, not to receive a *supplemental* or *explanatory* affidavit on the part of the plaintiff, nor a *counter* or *contradictory* one on the part

<sup>s</sup> 6 T. R. 688.

<sup>a</sup> 5 Bur. 2690.

<sup>t</sup> Doug. 217. 4 T. R. 577, 695. 5 T. R. 254, 722.

<sup>k</sup> 7 T. R. 375.

<sup>l</sup> *Huffey v. Baskerville*,

cited in 2 Will. 225.

<sup>m</sup> 1 Bur. 332.

<sup>n</sup> 7 T. R. 375.

<sup>o</sup> *Id.* 451.

<sup>p</sup> *Id.* 376. *in notis.*

<sup>q</sup> 1 Salk. 100.

of the defendant'. Even an affidavit of the plaintiff's confession, that the defendant owes him nothing, will not be received'.

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Since the making of the statute 12 Geo. I. the law of arrest has undergone some alterations, and further privileges have been created by subsequent statutes, in favor of particular persons. Thus, with regard to *seamen*, it is enacted', that "no person who shall serve as "a *petty officer* or *seaman*, or be embarked as a "non-commissioned officer of marines, or *marine*, "on board any of his majesty's ships or vessels, "shall be liable to be taken out of his majesty's "service, by any process or execution whatsoever, either in *Great-Britain*, *Ireland*, or "any other part of his majesty's dominions, "other than for some criminal matter, unless "such process or execution be for a real debt, "which shall have been contracted by such "petty officer or seaman, non-commissioned

\* 2 Str. 1157. 1 Willf. 335. *Spragg v. Young*, H. 35 G.  
 Say. Rep. 53. S. C. 2 Willf. III.  
 225. 1 Blac. Rep. 192. \* 1 Willf. 335.  
 1 Bur. 655. 4 Bur. 2017. \* Stat. 1 Geo. II. c. 14.  
 Doug. 450, 467. 1 T. R. § 15. 32 Geo. III. c. 33.  
 716. 5 T. R. 552, 3. § 22.

" officer



“ officer of marines, or marine, when he did  
“ not belong to any ship or vessel in his ma-  
“ jesty’s service, or other just cause of action,  
“ and unless before the taking out of such  
“ process or execution, not being for a cri-  
“ minal matter, or for a debt contracted in the  
“ service as aforesaid, the plaintiff or plaintiffs  
“ therein, or some other person or persons on  
“ his or their behalf, shall make affidavit,  
“ before one or more judge or judges of the  
“ court of record, or other court out of which  
“ such process or execution shall issue, or before  
“ some person authorised to take affidavits in  
“ such courts, that to his or their knowledge,  
“ the sum justly due to the plaintiff or plain-  
“ tiffs, from the defendant or defendants in the  
“ action, or cause of action on which such  
“ process shall issue, or the debt or damage  
“ and costs for which such execution shall be  
“ issued out, amounts to the value of, *twenty*  
“ pounds at the least, and that such debt, so  
“ amounting to twenty pounds or upwards,  
“ was contracted by the said defendant, when  
“ he did not belong as aforesaid to any ship in  
“ his majesty’s service; a *memorandum* of which  
“ oath shall be marked on the back of such  
“ process or writ, for which *memorandum* or  
“ oath no fee shall be taken,”

A simi-



A similar privilege is allowed, by the annual *mutiny acts* <sup>u</sup>, to *volunteer soldiers*, who are not liable to be taken out of his majesty's service, by any process or execution whatsoever, other than for some criminal matter, unless for a real debt, or other just cause of action; and unless, before the taking out of such process or execution, (not being for a criminal matter,) an affidavit shall be made as before-mentioned, that the original sum, justly due and owing to the plaintiff or plaintiffs, from the defendant or defendants in the action, or cause of action on which such process shall issue, or the original debt for which such execution shall be sued out, amounts to the value of *twenty pounds* at least, over and above all costs of suit in the same action, or in any other action on which the same shall be grounded.

These acts have been construed to extend, not merely to *common soldiers*, and *troopers* <sup>v</sup> in the life guards, &c. but also to *non-commissioned* or warrant officers, as *gunners* <sup>w</sup>, *serjeants*, and *drummers* <sup>x</sup>: For, a *serjeant* is a soldier with a halbert; and a *drummer* is a soldier with a drum <sup>y</sup>. These acts, however,

<sup>u</sup> 37 Geo. III. c. 33. § 63.

<sup>x</sup> 1 Will. 216. 1 Blac.

<sup>v</sup> 1 Str. 2. Say. Rep. 107. Rep. 29. S. C.

<sup>w</sup> 1 Str. 7.

<sup>y</sup> 1 Blac. Rep. 30.

do not extend to *commissioned* officers; nor to *soldiers* imprisoned for disobeying orders of justices<sup>2</sup>, or on any other *criminal* account<sup>3</sup>.

“ And if any *petty officer* or *seaman*, non-  
“ *commissioned officer* of marines, or *marine*, or  
“ any *volunteer soldier*, shall nevertheless be  
“ arrested; contrary to the intent of the before-  
“ mentioned acts, it shall and may be lawful  
“ for one or more judge or judges of the court,  
“ out of which the process or execution shall  
“ issue, upon complaint thereof made by the  
“ party himself, or by any one of his superior  
“ officers, to examine into the same, by the  
“ oath of the parties or otherwise, and by war-  
“ rant under his or their hands and seals, to  
“ discharge such *petty officer*, &c. so arrested,  
“ without paying any fee or fees, upon due  
“ proof made before him or them, that such  
“ *petty officer* or *seaman*, non-commissioned  
“ officer of marines, or *marine*, was actually  
“ belonging to one of his majesty's ships or  
“ vessels, or that such soldier was legally in-  
“ listed as a soldier in his majesty's service,  
“ and arrested contrary to the intent of the  
“ before-mentioned acts; and also to award to  
“ the party so complaining, such costs as such  
“ judge or judges shall think reasonable; for

<sup>2</sup> 2 T. R. 270.

<sup>3</sup> 5 T. R. 156.

"the recovery whereof, he shall have the like  
 "remedy, that the person who takes out the  
 "said execution might have had for his costs,  
 "or the plaintiff in the like action might have  
 "had for the recovery of his costs, in case  
 "judgment had been given for him, with costs,  
 "against the defendant in the said action <sup>b</sup>."

By other acts of parliament<sup>c</sup>, for the speedy and effectual recruiting of his majesty's land-forces and marines, "no person, *list*ed by virtue of those acts, shall be liable to be taken out of his majesty's service, by any process, other than "for some criminal matter." But these latter acts were only meant to privilege such persons as were compelled to serve against their will<sup>d</sup>; or rather to prevent their being taken out of the service, by means of *feigned* actions.

*Bankrupts*, who are not previously in custody, are exempted from the arrest of their creditors, in coming to surrender, and from their actual surrender for two and forty days, or such further time as shall be allowed for finishing their examination<sup>e</sup>; which privilege extends to all cases, except that of a surrender in discharge of bail<sup>f</sup>.

<sup>b</sup> Stat. 1 Geo. II. c. 14.    30 Geo. II. c. 8. § 20.  
 § 15.    32 Geo. III. c. 33.    <sup>d</sup> 1 Bur. 339, 466.  
 § 22.    37 Geo. III. c. 33.    <sup>e</sup> Stat. 5 Geo. II. c. 30.  
 § 63.    <sup>f</sup> 5 T. R. 209.  
<sup>c</sup> 29 Geo. II. c. 4. § 14.

But this is a *particular* privilege, to enable them to surrender, and till their actual surrender, is confined to the act of going with that view; not a *general* privilege, during the whole time which the act of parliament allows them for that purpose<sup>a</sup>. And they may be taken, in order to be surrendered by their *bail* at any time; even during their examination before the commissioners<sup>b</sup>.

Bankrupts, having obtained their certificates, as they cannot be sued, are not liable to be arrested, for debts contracted prior to their bankruptcy<sup>c</sup>; nor for the costs of any proceedings for the recovery of such debts, or of any interest thereon pending the commission<sup>d</sup>. And if a plaintiff become bankrupt after he is nonsuited, and before the taxation of the costs, the costs of the nonsuit are a debt proveable under the commission<sup>e</sup>. But where a bankrupt, sued as executor, pleaded a false plea, between the issuing of the commission, and the obtaining of his certificate, he was holden to be liable to costs for

<sup>a</sup> Cowp. 156.

Rep. 1317. 6 T. R. 282.

<sup>b</sup> 1 Atk. 238. Co. B. L.

but see 1 Str. 477, 8.

113.

<sup>c</sup> Stat. 5 Geo. II. c. 30.

<sup>d</sup> 5 T. R. 365. and see

§ 7, 13. 2 Str. 249.

1 H. Blac. 29. but see the case *ex parte Todd*, cited in

<sup>e</sup> 2 Str. 1196. 1 Willf. 41.

3 Willf. 270.

S. C. Cowp. 138. 2 Blac.



such plea, *de bonis propriis*<sup>m</sup>. And where the commission<sup>a</sup>, or certificate<sup>a</sup>, appears to be fraudulent, or the debt arises after the bankruptcy, as upon a recognizance in error<sup>b</sup>, or bail bond<sup>c</sup>, which was not then forfeited, the bankrupt may be arrested, notwithstanding his certificate. So it has been holden, that a bankrupt may be arrested, upon a *subsequent* promise, for a debt contracted previous to his bankruptcy<sup>d</sup>. Where the defendant is entitled to the benefit of his certificate, he may be discharged by the statute two ways; first, by pleading his certificate, if in time; and secondly, by applying to a judge, upon an affidavit of the certificate<sup>e</sup>, when it is obtained after judgment<sup>f</sup>.

*Insolvent debtors and fugitives*, discharged under insolvent acts<sup>g</sup>, are not liable to be arrested, even on *subsequent* promises<sup>h</sup>, for debts contracted prior to the times prescribed by the acts; but they may be arrested for debts contracted afterwards, and before they were actually discharged<sup>i</sup>.

<sup>a</sup> 3 Bur. 1368. 1 Blac. 26 G. III. K. B. 2 Bur. Rep. 400. S. C. 736. *contra*, and see Cowp.

<sup>b</sup> 2 Blac. Rep. 725. Cowp. 549.

824.

<sup>c</sup> Doug. 228.

<sup>d</sup> 2 Str. 1043.

<sup>e</sup> 1 Bur. 436.

<sup>f</sup> *Best v. Barker*, M. 23 G.

III. *Drew v. Jeffries*, H.

<sup>g</sup> Doug. 676.

<sup>h</sup> 1 Will. 41.

<sup>i</sup> See the stat. 37 Geo. III.

c. 112.

<sup>j</sup> 2 Str. 1233. *see also supra*.

<sup>k</sup> Cowp. 527.



The clauses respecting *fugitives* do not extend to persons who have constantly resided abroad<sup>a</sup>; or who have been abroad merely in the course of their trade, and not for the purpose of avoiding their creditors<sup>b</sup>. And it has been holden, that though certificated bankrupts, or persons discharged under insolvent acts, are privileged from arrest, yet the sheriff or his officer is not liable to an action of false imprisonment, for arresting them<sup>c</sup>.

The defendant having been once arrested, cannot in general be arrested again, for the same cause of action<sup>d</sup>. *Nemo debet bis vexari pro eadem causa*. Thus, where the defendant was arrested on a writ, taken out pending a prior action, wherein he had been previously arrested, for the same cause, the court discharged him on common bail<sup>e</sup>. But where, in a similar case, it appeared that the bail in the prior action were forsworn, the court refused to assist the defendant; saying, the plaintiff was right in laying hold of him as he did; for had he discontinued, the defendant would probably have run away<sup>f</sup>. So where A, having been arrested at the suit of B, gave him a draft for part of the demand, and agreed to settle the remainder in a few days;

<sup>a</sup> 1 Will. 85.

<sup>b</sup> Say. Rep. 308.

<sup>c</sup> Doug. 671.

<sup>d</sup> R. M. 15 Car. II. § 2.

<sup>e</sup> 2 Str. 1209.

<sup>f</sup> *Id.* 1216.

after which, the draft being dishonoured, B sued out a new writ against A, and arrested him again on the same affidavit; this was holden to be regular<sup>a</sup>. And it has been determined, that the plaintiff, after suing out *common* process, may sue out a *bailable* writ for the same cause, and arrest the defendant, before he discontinues the first action; for this is not a case within the rule, of not permitting the defendant to be twice arrested for the same cause<sup>b</sup>.

The rule we are now speaking of, was formerly so rigidly adhered to, that where the plaintiff was *nonpros'd* for want of a declaration, he could not afterwards have arrested the defendant, in a second action<sup>c</sup>. But a different doctrine now prevails<sup>d</sup>; for the plaintiff is said to suffer enough by paying costs in the first action, and therefore ought not to be in a worse condition than before. For a similar reason, where the plaintiff, having misconceived his action, moves to discontinue upon payment of costs, he may, after the costs are taxed and paid<sup>e</sup>, take out a new writ for the same cause, and have the defendant arrested *de novo*<sup>f</sup>. And if the defendant be discharged out of custody, on account of some act for

<sup>a</sup> 6 T. R. 52.

<sup>b</sup> *Id.* 616.

<sup>c</sup> 1 Ld. Raym. 679. Com.

Rep. 94. S. C.

<sup>d</sup> 1 Str. 439.

<sup>e</sup> 2 Str. 1209.

<sup>f</sup> 2 Will. 381.

which

which the plaintiff is not answerable, such as an alteration in the warrant to arrest, by the sheriff's officer, without the plaintiff's knowledge, in such case the defendant may, after the first action is discontinued, be again held to bail for the same cause\*. But where the plaintiff, not liking the bail in the former action, obtained a side-bar rule for leave to discontinue, upon payment of costs, and afterwards proceeded to charge the defendant in custody, with a declaration in a new action, the court, conceiving this to be a trick, discharged the side-bar rule; so that the bail to the former action still continued liable<sup>1</sup>. And wherever the second action appears to be *vexatious*<sup>m</sup>, or the defendant is arrested or detained in custody<sup>n</sup> therein, after being *superseded* or *superfedeable* in a former action, by the *laches* of the plaintiff<sup>o</sup>, the court will discharge the defendant on common bail; even though he be arrested, on a note given subsequent to the *supersedeas*<sup>p</sup>.

Upon the same principle, of not permitting the defendant to be twice arrested for the same cause, it is holden<sup>q</sup>, that in an action of debt upon judgment, whether after verdict or by default, the defendant cannot be arrested, if he was

\* 6 T. R. 218.

2 Willf. 93. Cowp. 72.

<sup>1</sup> 4 Bur. 2502.

° 2 Str. 1218.

<sup>m</sup> 2 Blac. Rep. 809.<sup>p</sup> 2 Str. 782. Say. Rep.<sup>n</sup> 2 Str. 782, 943, 1039.

43. Pr. Reg. 55, 6.

previously arrested in the original action; even though the bail in that action have since become *insolvent*<sup>1</sup>, or the plaintiff has *released* them, by declaring in a different county<sup>2</sup>, or the defendant has *surrendered* in their discharge, and obtained a *supersedeas*<sup>3</sup>. But if the defendant were not arrested in the original action, he may be arrested in an action of debt on the judgment<sup>4</sup>. And where a cause in which the defendant has been arrested is referred to arbitration, and the arbitrator awards to the plaintiff a sum exceeding 10 l., the defendant may be arrested again, in an action upon the award<sup>5</sup>.

It was formerly holden, that where the judgment was merely for *costs*, upon a non-suit<sup>6</sup>; or the debt was originally under ten pounds, but raised to a larger sum, by the addition of costs<sup>7</sup>; or the action was for *general* damages, which were reduced by the judgment to a sum *certain* above ten pounds<sup>8</sup>; the defendant could not be arrested, either upon the judgment itself, or upon a subsequent promise, in consideration of

<sup>1</sup> Say. Rep. 160.

<sup>2</sup> 2 Will. 93.

<sup>3</sup> 2 Str. 1039. R. H. 8 G. II. C. B. but see Cxf. Pr. C. B. 34.

<sup>4</sup> Pr. Reg. 55, 6.

<sup>5</sup> 2 T. R. 756.

<sup>6</sup> 5 Burr. 2660. 2 Blac.

Rep. 1274. C. B. *contra*.

<sup>7</sup> 2 Str. 975, 1077. 3 Bur. 1389. 4 Bur. 2117. Barnes, 432. *contra*.

<sup>8</sup> 2 Str. 1043. 1 Will. 120.

forbearance,



forbearance<sup>r</sup>, to pay the debt and costs. But in a late case, it was settled, agreeably to the practice of the court of common pleas, that a defendant may be arrested and held to special bail, in an action on a judgment for ten pounds, for damages and costs; though the original debt alone were under ten pounds<sup>s</sup>: which case seems also to govern the others, where the judgment is merely for *costs*, or the action was for *general damages*.

It only remains to be observed, that there is a *local* and *temporary*, as well as a *personal* privilege from arrest. By the former, no man can be arrested in his own house, provided the outer door be shut<sup>a</sup>; or in the king's presence<sup>b</sup>; or within the verge of his royal palace<sup>c</sup>, (except where the process issues out of the *palace court*<sup>d</sup>); or in any place where the king's justices are actually sitting<sup>e</sup>. The privilege of the *parties* to a suit, and their *witnesses*, of which we have before spoken<sup>f</sup>, may also in some measure be considered as of a *local* nature: and of

<sup>r</sup> Cowp. 129.

<sup>s</sup> 4 T. R. 570.

<sup>a</sup> 5 Co. 91. But see Cowp. 1, 63.

<sup>b</sup> 3 Blac. Com. 289.

<sup>c</sup> Stat. 28 Hen. VIII. c. 12.

<sup>d</sup> Ld. Raym. 978. 3 Salk.

91, 284. 6 Mod. 73. Holt, 590. S. C.

<sup>e</sup> 3 T. R. 735.

<sup>f</sup> 3 Inst. 140, 1. 1 Sid. 211. 1 Lev. 106. S. C.

2 Mod. 181.

<sup>g</sup> *Ant.* p. 61.



the same kind is that of *Clergymen*, who, by several ancient statutes<sup>a</sup>, are privileged from arrest, in going to and returning from church, or performing divine service; but not if they stay in church, with a fraudulent design of eluding the process of the law. And it is said, that the party grieved may have an action upon these statutes<sup>b</sup>.

Lastly, by the statute 29 Car. II. c. 7. § 6.  
 “no person or persons, upon the Lord’s day,  
 “shall serve or execute, or cause to be served  
 “or executed, any writ, process, warrant, order,  
 “judgment, or decree, except in cases of treason,  
 “felony, or breach of the peace; but the service  
 “of every such writ, &c. shall be void, to all  
 “intents and purposes<sup>c</sup>; and the person or persons so serving or executing the same, shall be  
 “as liable to the suit of the party grieved, and to  
 “answer damages to him for doing thereof, as if  
 “he or they had done the same, without any writ,

<sup>a</sup> 50 Edw. III. c. 5. 1 R. II. c. 15. and see 1 Mar. sess. 2. c. 3.

<sup>b</sup> 12 Co. 100. In 5 Bac. Abr. 565. it is said, that the arrest of a clergyman under a civil process, either in going to church, to perform divine service, or in returning from thence, on any day, is a false imprisonment. But from se-

veral later decisions, it may be collected, that if any action would lie, which is doubtful, it should be an action on the case, and not an action of *trespass*, against the sheriff or his officers. 3 Will. 341. 2 Blac. Rep. 1087, 1190. Doug. 671.

<sup>c</sup> 1 Salk. 78.

“ &c.”

"&c." In construing this statute, it has been holden, that an arrest cannot be made on a Sunday, for non-payment of a *penalty*, upon conviction<sup>\*</sup>. And where A was arrested at the suit of B, and discharged, the sheriff not knowing that there was also a detainer in his office, at the suit of C, and on the Sunday following he was arrested at C's suit, the court discharged him out of custody<sup>1</sup>; considering the arrest on the Sunday as an original taking, or as a retaking after a *voluntary* escape<sup>m</sup>, and in either case it was prohibited by the statute. But after a *negligent* escape, the defendant may be retaken on a Sunday; and that, either by the officer upon fresh pursuit, or by virtue of an escape-warrant<sup>n</sup>; for this is not an original taking, but the party is still in custody upon the old commitment. Also it is holden, that bail may take their principal on a Sunday, in order to surrender him<sup>o</sup>; for this is not by virtue of any process at all. And it should seem that process of contempt, being of a criminal nature, may be served upon a Sunday<sup>p</sup>.

<sup>\*</sup> 1 T. R. 265.

<sup>o</sup> 6 Mod. 231. 1 Atk.

<sup>1</sup> 5 T. R. 25.

239.

<sup>m</sup> Barnes, 373.

<sup>p</sup> 12 Mod. 348. 1 Atk.

<sup>n</sup> 2 Ld. Raym. 1028. 2 55.

Salk. 626. 6 Mod. 95. S. C.

## CHAP. IV.

*Of the EXECUTION of MESNE PROCESS;  
and other Proceedings, previous to the De-  
fendant's Appearance.*

**T**HERE are two ways of proceeding upon process against the person of the defendant, whether it be by bill in trespass, attachment of privilege, or original writ; first, by service of a copy of the process; secondly, by arrest.

Where the cause of action is under ten pounds, or it amounts to that sum, and no affidavit is made thereof, the defendant, we may remember, is to be personally served with a copy of the process; by which is understood, in general, a copy of such process as he might have been arrested upon, before the statute 12 Geo. I. c. 29.: and therefore, where the proceedings are by *original*, he should be served with a copy of the *capias*, and not of the *original* writ of *summons* or *attachment*\*. But where the defendant is in a county-palatine, he should be served with a copy of the process, issuing out of this court, and not of the *mandate*, from the

\* Barnes, 406, 410.

officer to whom it is directed<sup>b</sup>. The copy of the process may be served by the sheriff or his officers, (except in particular franchises, having the return of writs,) or by any one else<sup>c</sup>, provided he be able to examine the copy with the original, so as to swear (if necessary) to the service. In particular franchises and jurisdictions, the proper officer there should execute the process<sup>d</sup>. Formerly, a copy of the process must have been served on the defendant *before* the return day<sup>e</sup>; but now it is holden, that service at any time, even after the rising of the court, on the return day, is sufficient<sup>f</sup>. A bill of *Middlesex* should not be served in *London*, or elsewhere out of the county of *Middlesex*<sup>g</sup>; nor whilst the defendant is attending his cause at the sittings<sup>h</sup>: but where there is any dispute as to the boundaries of the county, the court will not determine it on motion<sup>i</sup>. And it is now settled, that a *latitat* may be served in *Middlesex*, or any other county<sup>k</sup>. On serving the copy, it is not necessary, though usual, to shew the original

<sup>b</sup> 2 Barnardist. 318, 327. Pr. Reg. 352. 2 Wils. 372.  
337, 398. Pr. Reg. 344. <sup>c</sup> Doug. 384. 1 T. R. 187.  
Barnes, 405. <sup>d</sup> 2 Str. 1094.

<sup>e</sup> Pr. Reg. 345.

<sup>f</sup> Stat. 5 G. II. c. 27. § 3.

<sup>g</sup> Barnes, 413, 424.

<sup>h</sup> 2 Bur. 812. 1 T. R. 192.

<sup>i</sup> 1 Wils. 77.

<sup>k</sup> Doug. 384. 1 T. R. 187.

6 T. R. 74.

process,



process<sup>1</sup>, unless demanded<sup>2</sup>. And in an action against husband and wife, it is deemed sufficient to serve the husband only<sup>3</sup>.

If, upon the service, the defendant speak contemptuous words of the *court*, or its *process*, he is liable to an *attachment*. And where the words are spoken of the *court*, the attachment issues in the first instance<sup>4</sup>; for it would be to no purpose to grant a rule to shew cause, which would probably expose the court to further insult<sup>5</sup>. It has been doubted, however, whether, when such words are sworn to by one person only, the rule should be absolute, or only to shew cause<sup>6</sup>; the rule in *chancery* requiring two affidavits, to deprive the party of the benefit of shewing cause: and in this court, the rule is only to shew cause, where the words are spoken of its *process*<sup>7</sup>.

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An *arrest* must be by actually seizing or touching the defendant's body<sup>8</sup>; and is made by the sheriff or his officers, or by the bailiff of a liberty or franchise. The sheriff's au-

<sup>1</sup> 2 Str. 877. Barnes, 422.

<sup>2</sup> Cal. temp. Hardw. 138.

<sup>3</sup> Barnes, 406, 412. Pr. Reg. 351. S. C.

<sup>4</sup> 6 Mod. 43. 1 Salk. 84.

<sup>5</sup> 1 Str. 185. Say. Rep. 47.

R. T. 17 G. III.

<sup>6</sup> 1 Salk. 84.

<sup>7</sup> 2 Str. 1068.

<sup>8</sup> Say. Rep. 114.

<sup>9</sup> 1 Salk. 79.

thority is derived *immediately* from the court, except in counties-palatine, where he acts by virtue of a *mandate* from the officer to whom the writ is directed. And even there, if the writ be directed immediately to the sheriff, he is bound to execute it; and a bail bond taken on the arrest is legal<sup>1</sup>. The officers of the sheriff are of three kinds, first, bailiffs *in fee*, or *perpetual* bailiffs, who have, by charter or prescription, the execution of writs within the *guildable*<sup>2</sup>; secondly, *common* bailiffs, who are usually bound with sureties in an obligation for the due execution of their office, and thence are called *bound* bailiffs<sup>3</sup>; thirdly, *special* bailiffs, nominated by the plaintiff or his attorney, and appointed by the sheriff *pro hac vice*<sup>4</sup>. The sheriff's warrant to any of these officers ought not to be made out, until the sheriff have the writ in his actual custody<sup>5</sup>. And where the sheriff, having directed a warrant to A and all his other officers, to arrest B, A afterwards inserted therein the name of C, it was holden that

<sup>1</sup> 6 T. R. 71.

<sup>2</sup> For an account of the *guildable*, and how it differs from a *franchise*, see 8 Co. 125. a. Dalt. Sher. 185. And for the nature of the office of a bailiff *in fee*, see Dalt.

Sher. 187. Gilb. C. P. 30. (t

<sup>3</sup> 1 Blac. Com. 346.

<sup>4</sup> 2 Blac. Rep. 952. 4 T. R. 119.

<sup>5</sup> R. E. 15 Car. II. § 4. Stat. 6 Geo. I. c. 21. § 53.

the warrant was illegal, and the arrest by C consequently void<sup>r</sup>.

If the defendant reside within a liberty, the bailiff of which has the execution and return of writs, there should regularly be a *non omittas*; or if there be not, the sheriff, for having execution of the writ, should make out his *mandate*, directed to the bailiff of the liberty<sup>a</sup>. And if there be two liberties in a county, and the sheriff make his mandate to the bailiff of one of them, who gives him no answer, he may, upon a *non omittas*, arrest the defendant in either liberty<sup>a</sup>; and even if the sheriff enter, and arrest the defendant in a liberty, without a *non omittas*, the arrest is good, though the sheriff may be liable to an action<sup>b</sup>. The arrest may be made at any time (except on a Sunday) before, or on the day of the return of the writ; and at any place within the county, except where the defendant is privileged. But it cannot be made, between the day of the return and *quarto die post*, by original<sup>c</sup>. In making the arrest, it is not necessary that the officer, who has the *authority*, should be the *hand* that arrests, nor in the presence of the person arrested, nor actually in

<sup>r</sup> 6 T. R. 122.

<sup>a</sup> Gilb. C. P. 25, &c.

<sup>c</sup> 5 Co. 92. a. Gilb. C. P.

29.

<sup>b</sup> Gilb. C. P. 27. *Flintpatrick v. Kelly*, 22 G. III.

<sup>c</sup> 5 T. R. 687.

<sup>d</sup> 1 Sid. 229.

light,

fight, nor is any exact distance prescribed: It is sufficient that he be near, and acting in the arrest\*.

When the defendant is arrested, he is either let out of custody, upon giving bail to the sheriff, or an attorney's undertaking, for his appearance; or he remains in custody, or escapes, or is rescued, &c.

Before the statute 23 Hen. VI. c. 9. the sheriff was not obliged to bail a defendant, arrested upon mesne process, unless he sued out a writ of *mainprize*; though he might have taken bail of his own accord\*. This arbitrary power produced great extortion and oppression of the subject; to remedy which, it was enacted, by the above statute, "that  
"sheriffs, &c. shall let out of prison all man-  
"ner of persons arrested, or being in their  
"custody, by force of any writ, bill, or war-  
"rant, in any action personal, or by cause of  
"indictment of trespass, upon reasonable sure-  
"ties of sufficient persons, having sufficient  
"within the counties, where such persons be

\* Cowp. 65.

Plowd. 67. Dalt. Sher. 356.

\* Gilb. C.P. 20, 21. & Bac. And see Vent. 55. 25.  
Abr. 461. F.N.B. 251. 2 Saund. 60. 1 H. Blac. 235.



“ so let to bail or mainprize, to keep their days  
“ in such place, as the said writs, bills, or war-  
“ rants shall require; persons being in their  
“ ward by condemnation, execution, *capias ut-*  
“ *lagatum* or *excommunicatum*, surety of the  
“ peace, or by special commandment of any  
“ justice, and vagabonds refusing to serve ac-  
“ cording to the statute of labourers, only  
“ excepted.”

“ And that no sheriffs, &c. shall take, or  
“ cause to be taken, any obligation, for any  
“ cause aforesaid, or by colour of their office,  
“ but only to themselves, of any person, nor  
“ by any person, which shall be in their ward  
“ by course of law, but by the name of their  
“ office; and upon condition written, that the  
“ prisoners shall appear at the day and place  
“ contained in the writ, bill, or warrant. And  
“ if any sheriffs, &c. take any obligation in  
“ other form, by colour of their office, it shall  
“ be void.”

This statute hath two branches, first, as to the persons to be let to bail; and, secondly, as to the form of the security. Upon the first branch of the statute, it has been determin'd, that the sheriff has no authority to take a bond, for the appearance of persons arrested by him, under process issuing upon an indictment at the quarter sessions, for a misdemeanor; but can only take  
a re-

a recognizance for their appearance<sup>f</sup>; neither can he take bail on an attachment for a contempt<sup>g</sup>. And though the words of it seem to be confined to persons arrested, and in actual custody, yet it has been holden, that the arrest need not be stated, in an action upon the bail bond<sup>h</sup>; and if stated, it is not traversable<sup>i</sup>: for it would be of mischievous consequence, if a bail bond taken civilly, without exposing the party by an arrest, were not as effectual as if he had been actually arrested. Where the defendant is arrested, and in actual custody, it is the duty of the sheriff to take bail, if required: and therefore if a bail bond be tendered, with sufficient sureties, and the sheriff refuse to accept it, he is liable to a special action on the case<sup>k</sup>. The clause, which requires reasonable sureties, was introduced for the benefit of the sheriff; and therefore, though he may insist upon two sureties, yet he may take a bond with *one* only<sup>l</sup>. And for the same reason, the plaintiff cannot maintain an action against him; for taking sure-

<sup>f</sup> 4 T. R. 505.

<sup>g</sup> 1 Str. 479. Com. Rep. 264. 2 Salk. 608. *contra*.

<sup>h</sup> 1 Str. 643.

<sup>i</sup> Id. 444. But see Noy, 43. *semb. contra*. See also Say. Rep. 116. by which it appears, that the issuing of the

process may be traversed.

<sup>k</sup> Gilb. C. P. 29. Cro. Car. 196. W. Jon. 226.

S. C. 1 Sid. 22. 2 Mod.

31, 84, 180. 2 Vent. 96.

<sup>l</sup> 10 Co. 100. b. Cro. Eliz. 624, 808, 852, 862.

ties that are insufficient, or do not inhabit within the county<sup>m</sup>.

The second branch of the statute requires a security by *bond*<sup>n</sup>; respecting which, there are three things to be observed; first, that it be made to the sheriff himself; secondly, that it be made to him, by his name of office; and, thirdly, that it be conditioned for the defendant's appearance, at the return of the writ, and for that only<sup>o</sup>. Therefore, if the bond be not made to the sheriff<sup>p</sup>, or be not made to him by his name of office<sup>p</sup>, or if it be single without any condition at all<sup>p</sup>, or with an impossible condition<sup>q</sup>, or the condition be not for the defendant's appearance<sup>p</sup>, or be for that and something else<sup>p</sup>, it is void by the statute. If the objection appear on the face of the declaration, or upon *oyer*, the defendant may demur; but otherwise he should plead it: and when, by pleading or otherwise, it appears in any part of the record, he may move in arrest of judgment<sup>r</sup>.

<sup>m</sup> Cro. Eliz. 808, 852, 862.      <sup>o</sup> Cro. Eliz. 862.      4 Bac. Noy, 39.      1 Sid. 96.      2 Saund. Abr. 462.  
<sup>n</sup> 59.      1 Mod. 227, 239.      2 Mod.      <sup>p</sup> Dyer, 119, 120.      10 Co. 83, 177.      But see 1 Ld. 100. a, b.  
Raym. 425.      1 Salk. 99.      <sup>q</sup> 3 Lev. 74.      1 Str. 399.  
S. C. 6 Mod. 122.      *simil.*      Fort. 363.      S. C.      2 T. R. 569.  
*contra.*

<sup>r</sup> 1 T. R. 421.

<sup>r</sup> 2 T. R. 569.

If the bond be substantially good, it cannot be avoided for any trifling informality, or variance of the condition from the writ, in the description of the plea, or of the time or place of appearance. Thus, where the writ was to answer the plaintiff in a plea of debt, *for three hundred and twenty pounds*, or in a plea of trespass, with an *ac-etiam*, and the condition was to answer the plaintiff in a plea of debt, or trespass, *generally*, or without mentioning the plea at all, the variances were holden to be immaterial<sup>1</sup>; for the statute only requires a bond conditioned for the defendant's appearance, and the description of the plea is merely surplusage. And accordingly, where the sheriff, upon an original writ in a plea of trespass *on the case on promises*, took a bail bond conditioned for the defendant's appearance, to answer the plaintiff, in a plea of *trespass*, the court held it to be valid<sup>2</sup>. So where the writ, in *trespass*, was to appear before *the lord the king* at Westminster, and the condition was to appear before *the justices of the King's Bench* at Westminster<sup>3</sup>, the bond was holden good. And where the writ, by *original*, was returnable before the lord the

<sup>1</sup> Cro. Jac. 286. 2 Lev. *Amb. contra.*

123. 2 Show. 51. T. Jon. 1 6 T. R. 722.

137, 8. 6 Mod. 122. 10 Mod. " 2 Lev. 186. T. Jon. 46.

327. But see 2 Lev. 177. S. C. 2 Vent. 237, 8.



king, *wheresoever he shall then be in England*, and the condition was without the words *wheresoever*, &c. the court gave judgment for the plaintiff, in an action upon the bond, saying, they would understand, that by appearing before the king was meant, before the king in his *court*, and not before the king in *person*<sup>v</sup>. It has also been holden, that the statute for preventing frivolous and vexatious arrests<sup>w</sup> is merely *directory* to the sheriff, and does not avoid the bail bond, where there is no affidavit of the cause of action<sup>x</sup>, or the sum sworn to is not indorsed on the writ<sup>y</sup>, or even where the sheriff takes bail for more than the sum sworn to<sup>z</sup>.

The provisions of the statute of Hen. VI. are not applicable to securities taken by, or for the benefit of the plaintiff<sup>a</sup>. And hence, an attorney is bound by his undertaking to appear for the defendant, though it be not exactly in the form prescribed. By an old rule of court<sup>b</sup>, "a prisoner taken upon a *capias* shall not be discharged, till he hath given bond to appear, unless the plaintiff or his attorney shall consent to take an appearance, without bail."

<sup>v</sup> 2 Str. 1155, 6.

<sup>w</sup> Cro. Eliz. 190. 1 Sid.

<sup>x</sup> 12 Geo. I. c. 29.

132. 1 Lev. 98. 8. C.

<sup>y</sup> 1 Bur. 330.

3 Mod. 205.

<sup>z</sup> 2 Wils. 69. 1 Bur. 331.

<sup>a</sup> R. M. 1654. § 6.

<sup>b</sup> H. Blac. 76.

But it is now the common practice to take an attorney's undertaking, where special bail is required; and the court will enforce it by attachment<sup>b</sup>.

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If the defendant, upon being arrested, remains in custody, he is either confined in a private house, or carried to the county gaol. And to prevent persons from suffering by the oppression of inferior officers, in the execution of process for debt, it is enacted by the statute 32 Geo. II, c. 28.<sup>c</sup>, commonly called the *Lords Act*, that "no sheriff, under-sheriff, bailiff, serjeant at mace, or other officer or minister, shall convey or carry, or cause to be conveyed or carried, any person or persons by him or them arrested, or being in his or their custody, by virtue or colour of any action, writ, process, or attachment, to any tavern, alehouse, or other publick victualling or drinking house, or to the private house of any such officer or minister, or of any tenant or relation of his, without the free and voluntary consent of the person or persons so arrested or in custody; nor charge any such person or persons with any sum of money, for any wine, beer, ale, victuals,

<sup>b</sup> 1 T. R. 422.

<sup>c</sup> § 1.

“ tobacco, or any other liquor or things whatso-  
“ ever, save what he, she, or they shall call for,  
“ of his, her, or their own free accord; nor shall  
“ cause or procure him, her, or them, to call or  
“ pay for any such liquor or things, except what  
“ he, she, or they shall particularly and freely  
“ ask for; nor shall demand, take, or receive,  
“ or cause to be demanded, taken, or received,  
“ directly or indirectly, any other or greater sum  
“ or sums of money, than is or shall be by law  
“ allowed to be taken or demanded, for any ar-  
“ rest or taking, or for detaining, or waiting till  
“ the person or persons so arrested or in custody  
“ shall have given an appearance or bail, as the  
“ case shall require, or agreed with the person  
“ or persons at whose suit or prosecution he, she,  
“ or they shall be taken or arrested, or until he,  
“ she, or they shall be sent to the proper gaol  
“ belonging to the county, riding, division, city,  
“ town, or place where such arrest or taking shall  
“ be; nor shall exact or take any reward, gra-  
“ tuity, or money for keeping the person or per-  
“ sons so arrested or in custody out of gaol or  
“ prison.”

“ And that no sheriff, &c. shall carry any  
“ such person to any gaol or prison, within *four-*  
“ *and-twenty hours* from the time of such arrest,  
“ unless such person or persons so arrested shall  
“ refuse to be carried to some safe and conve-  
“ nient

" nient dwelling-house, of his, her, or their own  
" nomination or appointment, within a city, bo-  
" rough, corporation, or market town, in case  
" such person or persons shall be there arrested,  
" or within three miles from the place where such  
" arrest shall be made, if the same shall be made  
" out of any city, borough, corporation, or mar-  
" ket town, so as such dwelling-house be not the  
" house of the person arrested, and be within the  
" county, riding, division, or liberty in which  
" the person under arrest was arrested; and then  
" and in any such case, it shall be lawful to and  
" for any such sheriff, or other officer or minister,  
" to convey or carry the person or persons so ar-  
" rested, and refusing to be carried to such safe  
" and convenient dwelling-house as aforesaid, to  
" such gaol or prison, as he, she, or they may be  
" sent to, by virtue of the action, writ, or process  
" against him, her, or them: And that no sheriff,  
" &c. shall take or receive any other or greater  
" sum or sums, for one or more night's lodging,  
" or for a day's diet, or other expences of any  
" person or persons under arrest, on any writ,  
" action, attachment, or process, other than what  
" shall be allowed as reasonable in such cases, by  
" some order or orders, made by justices of the  
" peace, in pursuance of the said act."

" § 8.

H 4

These



These provisions are confined to persons arrested on *mesne* process; the intent of them being, that such persons may have an opportunity of procuring bail, or of agreeing with the plaintiff; and it has accordingly been determined, that a sheriff's officer is not liable to the penalties of the statute, for carrying a defendant taken in *execution* to prison, within twenty-four hours after the arrest\*. No time is limited by the above act, within which a defendant, arrested on *mesne* process, should be carried to the county gaol: And where, to an action for an escape on *mesne* process, the sheriff pleaded, that the debtor was rescued out of his custody, as he was carrying him to *Newgate*, to which the plaintiff replied, that the debtor ought to have been carried to prison within a *convenient* time after the arrest, and that he was rescued, because the defendant neglected, &c. the court thought the replication bad, and gave judgment for the defendant†. But it seems to be the duty of the sheriff, if possible, to carry the defendant to the county gaol, by the return of the writ on which he was arrested‡; and that afterwards the sheriff keeps him at his peril, in case the creditor is delayed. Where the defendant, however, is arrested on the return day, he cannot be carried to the county gaol, till the

\* 4 T. R. 555.

† 1 Lutw. 128.

‡ Per Buller, Just. 5 T. R.

expiration of twenty-four hours after the arrest<sup>h</sup>. And where the sheriff, having arrested a defendant on mesne process, keeps him in his custody after the return of the writ, and then carries him to prison, he is not liable to an action on the case, as for an escape, if the jury find that the plaintiff has not been delayed, or prejudiced in his suit<sup>k</sup>.

For the further protection of persons arrested, against the *oppression* of inferior officers, and the *exaction* of gaolers, to whose custody they may be committed, it is by the same statute<sup>h</sup> enacted, that "every sheriff, under-sheriff, bailiff of any  
" liberty, gaoler and keeper of any prison or gaol,  
" and other person and persons, by whom, or to  
" whose custody or keeping, any one shall be ar-  
" rested, taken, committed, or charged in execu-  
" tion, by virtue of any writ, process, or action,  
" or attachment, shall at all times permit and  
" suffer every such person and persons, during  
" his, her, and their respective continuance un-  
" der arrest, or in custody, or in execution for  
" any debt, damages, costs, or contempt, at his,  
" her, and their free will and pleasure, to send  
" for, or have brought to him, her, or them, at  
" seasonable times in the day-time, any beer, ale,  
" victuals, or other necessary food, from what  
" place he, she, or they shall think fit, or can

<sup>h</sup> 5 T. R. 40.

<sup>k</sup> Id. 37.

<sup>k</sup> § 4.

" have

“ have the same ; and also to have and use such  
“ bedding, linen, or other necessary things, as  
“ he, she, or they shall have occasion for, and  
“ think fit, or shall be supplied with, during his,  
“ her, or their continuance under any such ar-  
“ rest or commitment, without purloining or de-  
“ taining the same, or any part thereof, or in-  
“ forcing or requiring him, her, or them to pay  
“ for the having or using thereof, or putting any  
“ manner of restraint or difficulty upon him,  
“ her, or them, in the using thereof, or relating  
“ thereto ; and no such prisoner or prisoners  
“ shall pay any thing in respect thereof, to any  
“ such sheriff, &c : And that no gaoler or keeper  
“ of any gaol or prison, or other person thereto  
“ belonging, shall demand, take, or receive, di-  
“ rectly or indirectly, of any prisoner or prison-  
“ ers for debt, damages, costs, or contempt, any  
“ other or greater fee or fees whatsoever, for his,  
“ her, or their commitment, or coming into  
“ gaol, chamber-rent there, release or discharge,  
“ than what shall be mentioned or allowed in the  
“ list or table of fees, settled, inrolled, and re-  
“ gistered according to the directions of the said  
“ act<sup>1</sup>.”

And for the more speedy punishing gaolers,  
bailiffs, and others employed in the execution of  
process, for *extortion*, or other abuses in their re-

pective offices and places, it is further enacted,  
“ that upon the petition, in *term* time, of any  
“ prisoner, or person being, or having been,  
“ under arrest or in custody, complaining of any  
“ exaction or extortion by any gaoler, bailiff, or  
“ other officer or person, in or employed in the  
“ keeping or taking care of any gaol or prison,  
“ or other place, where any such prisoner or per-  
“ son under, or having been under, arrest or in  
“ custody, by any process or action, is or shall  
“ have been carried, or in respect of the arresting  
“ or apprehending any person or persons, by  
“ virtue of any process, action, or warrant, or  
“ of any other abuse whatsoever, committed or  
“ done in their respective offices or places, unto  
“ any of his majesty's courts of record at *West-*  
“ *minster*, from whence the process issued, by  
“ which any person who shall so petition was ar-  
“ rested, or under whose power or jurisdiction  
“ any such gaol, prison, or place is; or in *vaca-*  
“ *tion* time, to any judge of any such courts at  
“ *Westminster*, from whence any such process so  
“ issued; or to the judges of assize, &c.; every  
“ such court, judges of assize, &c. are by the  
“ said act authorised and required to hear and  
“ determine the same, in a summary way, and to  
“ make such order thereupon, for redressing the  
“ abuses which shall by any such petition be  
“ complained of, and for punishing such officer  
“ or



“ or person complained against, and for making  
“ reparation to the party or parties injured, as  
“ they shall think just, together with the costs of  
“ every such complaint; and all orders and deter-  
“ minations which shall be thereupon made, by  
“ any of the said courts, &c. shall have the same  
“ effect, force, and virtue, as other orders of  
“ the same courts, &c., and obedience thereto  
“ may be enforced in like manner, by attach-  
“ ment or otherwise.”

“ And that every sheriff, under-sheriff, bailiff  
“ of any liberty, bailiff, serjeant at mace, gaoler,  
“ and other officer and person as aforesaid, who  
“ shall in anywise offend against the said act,  
“ shall, for every such offence, (over and above  
“ such other penalties or punishments as he may  
“ be liable unto,) forfeit and pay to the party  
“ thereby aggrieved, the sum of *fifty* pounds; to  
“ be recovered, with *treble* costs of suit, by action  
“ of debt, bill, plaint, or information, in any of  
“ his majesty's courts of record at *Westminster*.”

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Where the sheriff, having arrested the defend-  
ant, suffers him to go at large, upon giving bail  
for his appearance at the return of the writ, he is  
not liable to an action of *escape*; for he was

obliged by the statute to take bail<sup>o</sup>. And even where he suffers him to go at large without bail, he is not, it seems, liable to an action, provided he have him at the return of the writ<sup>r</sup>. But if he have him not then, or afterwards suffer him to go at large, without lawful authority, he is, in either case, liable to an action<sup>r</sup>. And where an action is brought against the sheriff, after he has taken bail, he must plead the statute; and cannot take advantage of it, on demurrer to the declaration, or in arrest of judgment<sup>r</sup>.

Where the defendant is *rescued* upon mesne process, as he is going to prison, the sheriff may return the rescue<sup>r</sup>; but not, where the defendant is rescued, after he is put in prison, except by the king's enemies<sup>r</sup>. Upon the sheriff's return of a *rescue*, the plaintiff has a triple remedy against the rescuers; by attachment, action on the case, or indictment<sup>u</sup>. The return of a rescue is of

<sup>o</sup> Cro. Eliz. 624, 852. S. C. 2 Saund. 154, 5.  
 Noy, 39. S. C. 1 Sid. 23. <sup>r</sup> Cro. Jac. 419. 3 Bulst.  
 1 Vent. 55. 3 Salk. 314, 15. 198. 1 Rol. Rep. 388, 440.  
 Gilb. C. P. 22. S. C. 3 Lev. 46. 1 Str. 435.  
<sup>p</sup> 2 T. R. 172. Gilb. C. P. 23. but see Cro.  
 Eliz. 868. *contra*.  
<sup>q</sup> Noy, 39. 1 Mod. 228, 9. <sup>r</sup> Cro. Jac. 419. 1 Rol.  
 2 Mod. 178. S. C. Gilb. Rep. 441. 1 Str. 435. 5 Bur.  
 C. P. 22. 2 T. R. 174, &c. 2814.  
<sup>r</sup> Cro. Eliz. 460. Moor, <sup>u</sup> Com. Dig. tit. *Rescous*,  
 428. S. C. 1 Sid. 22, 439. D.  
 1 Vent. 85. 1 Mod. 33, 57.

itself a conviction<sup>v</sup>; and the court will grant an *attachment* upon it, in the first instance<sup>w</sup>, which should be made returnable at a *general* return, though the original process was at a day *certain*<sup>x</sup>. But, without the sheriff's return, the court will not grant an attachment, upon a mere affidavit of the fact<sup>y</sup>. It was formerly the constant course, upon the return of a rescue, to set a certain fine of four nobles on each offender<sup>z</sup>: but of late years, the courts have fined according to their discretion, upon considering the circumstances of the case<sup>a</sup>. And as the sheriff's return of a rescue is not traversable, the court will proceed to punish the rescuers, without going through the ordinary course of examining them upon interrogatories<sup>b</sup>. But where a defendant was brought up on an attachment, for rescuing a person arrested on a warrant for obstructing excise officers, it was said to be the invariable practice of the court, in such a case, to put the defendant to answer interrogatories, though he did not deny the charge in the affidavits, unless the prosecutor waived putting them<sup>c</sup>.

<sup>v</sup> Cas. temp. Hardw. 112.<sup>w</sup> T. Jon. 198. 2 Salk.<sup>x</sup> 2 Salk. 586. Say. Rep. 586.

121. 4 Bur. 2129.

<sup>a</sup> 1 Str. 642.<sup>y</sup> 1 Str. 624.<sup>b</sup> 4 Bur. 2129.<sup>z</sup> 2 Salk. 586. 6 Mod.<sup>c</sup> 5 T. R. 362.

141. 1 Str. 531.

## C H A P. V.

## Of APPEARANCE.

**I**N the present chapter, I shall consider the *appearance* of the parties, which is either in *person* or by *attorney*; or, in case of infancy, by *procbein amy* or *guardian*.

At common law, the plaintiff and defendant must, in general, have appeared in *person*; and could not have appeared by *attorney*, without the king's special warrant, by writ, or letters patent<sup>a</sup>. But a *corporation* aggregate, not being capable of a personal appearance, could only have appeared by *attorney*, appointed under their common seal<sup>b</sup>. And now, by the statute of *Westm. 2. c. 10.* a general liberty is given to the parties, of appearing by *attorney*<sup>c</sup>. Yet there are certain persons, such as *feme-coverts*, *ideots*, &c. who, for want of legal discretion, are incapable of appointing an *attorney*; and must therefore appear in *person*<sup>d</sup>: And any one else, if he think proper,

<sup>a</sup> Co. Lit. 128. a. 2 Inst. 249, 378. F. N. B. 25. 1 Mod. 244. 2 Mod. 83. S. C.

<sup>b</sup> Bro. Abr. tit. *Corporation*, 28. Co. Lit. 66. b.

<sup>c</sup> Gilb. C. P. 32, 3. 2 Inst. 376. F. N. B. 55.

<sup>d</sup> Co. Lit. 135. b. 2 Inst. 390. F. N. B. 27.

may



may still appear, and prosecute or defend his suit, in the same manner<sup>e</sup>; which is usually done by attornies and prisoners.

Attornies were anciently appointed in court, when actually present<sup>f</sup>: but they are now usually appointed out of court by *warrant*, which should regularly be in *writing*; but an authority by *parol* is said to be sufficient to support a judgment<sup>g</sup>. And even if an attorney appear without warrant, it is a good appearance as to the court; though he is liable to an action<sup>h</sup>. Where an attorney once appears, or undertakes to be attorney for another, he shall not be permitted to withdraw himself<sup>i</sup>; and it is said to be his duty to proceed in the suit, although his client neglect to bring him money<sup>k</sup>.

The warrant of attorney continues in force until the judgment, and for a year and a day afterwards, in order to have execution<sup>l</sup>; unless it be sooner countermanded by the act of the principal, or determined by the death of the attorney. Where an attorney, having been retained, has undertaken to appear, the defendant cannot

<sup>e</sup> Say. Rep. 217.

<sup>l</sup> T. R. 62.

<sup>f</sup> 1 Will. 39.

<sup>i</sup> 1 Sid. 31.

<sup>g</sup> 2 Keb. 199. 1 Lil. P. R.

<sup>k</sup> Say. Rep. 173.

134. 137.

<sup>l</sup> 2 Inst. 378. Gilb. Exec.

<sup>h</sup> 1 Keb. 89. 1 Salk. 86, 92, 3. Run. Ej. 428.

88. 6 Mod. 16. But see

counter-

countermand the appearance after his retainer<sup>a</sup>; nor can he change his attorney, at any time pending the suit, without leave of the court, or a judge, and notice to the adverse party or his attorney<sup>a</sup>. If an attorney *die* pending the suit, his warrant is determined<sup>c</sup>: but the party who employed him must have notice of his death; and if he will not appoint another attorney, his adversary may proceed in the action<sup>d</sup>.

At common law, the warrant of attorney might have been *filed*, and entered of record, at any time before judgment<sup>e</sup>: but there are several acts of parliament<sup>f</sup>, requiring it to be done sooner, under severe penalties. By the last of these acts it is provided, that "the attorney for the plaintiff shall file his warrant of attorney, with the proper officer, the same term he declares; and the attorney for the defendant, the same term he appears, under the penalties inflicted by former laws." Upon this act of parliament, the court made a rule<sup>g</sup>, "that the defendant's attorney, at the time of

<sup>a</sup> R. M. 1654. § 10. 1 Lil. 1 Will. 39.

P. R. 134. 143.

<sup>b</sup> 18 Hen. VI. c. 9. 32 Hen.

<sup>c</sup> *Id.* 1 Blac. Rep. 8. Doug. 217.

VIII. c. 30. s. 2, 3. 18 Eliz. c. 14. s. 3. 4 & 5 Ann.

<sup>d</sup> 1 Lil. P. R. 141.

c. 16.

<sup>e</sup> *Id.* 137. 2 Keb. 275.

<sup>f</sup> R. M. 5 Ann. II.

<sup>g</sup> 41 Ed. III. 1. b. but see

"his appearance, shall give the plaintiff's at-  
 "torney, the warrant of attorney for the de-  
 "fendant; and at the time of delivering the  
 "copy of the declaration, or taking it out  
 "of the office, when filed, shall pay four-  
 "pence for the said warrant: which warrant  
 "of attorney the plaintiff's attorney shall file,  
 "with the officer appointed for filing it, at  
 "the same time he files, or ought to file,  
 "the warrant of attorney for the plaintiff.  
 "And if the defendant's attorney refuse to  
 "pay the same, the plaintiff's attorney may  
 "sign judgment." Notwithstanding these re-  
 gulations, however, it has been determined,  
 that the warrants of attorney may be *filed*,  
 so as to support the proceedings, at any time  
*pendente lite*, or before final judgment; though  
 the attorney may be fined, for not filing them  
 in due time'. It was anciently the course  
 of this court, to enter the warrants of at-  
 torney on a particular roll, kept for that pur-  
 pose'; but this course was altered in the time  
 of *Wright*, Ch. J. who caused them to be entered  
 on the top of the plea-roll', as the practice is

' *Dyer*, 180, 225. *Cro. Jac.* 183. *Doug.* 115.  
 277. *March*, 121. 8 *Mod.* " 1 *Salk.* 88.  
 77. 1 *Str.* 526. 2 *Str.* 807. " 1 *Salk.* 88. *R. E.* 4 *Jac. II.*  
 2 *Ld. Raym.* 1532. *S. C.* and see *Append.* Chap. V.  
*Fitzgib.* 191. 1 *Willf.* 39, [A.]

at this day. The *want* of a warrant of attorney is *aided* after verdict<sup>w</sup>, or judgment by *nil dicit*<sup>x</sup>, &c. by the statutes of jeofails: and by the statute of 8 Hen. VI. c. 12. a misprision of the clerk in the warrant may be *amended*, in affirmance of the judgment<sup>y</sup>.

It only remains to be observed, with regard to the warrant of attorney, that by a late act of parliament<sup>z</sup>, which subjects it to a stamp-duty, "no attorney shall sue out any writ or process, or commence, prosecute, or defend any action, unless he shall have delivered to the officer or his deputy, appointed to sign or issue the first process for the plaintiff, or to enter, file, or record the bail or appearance for the defendant, a *memorandum* or minute of his warrant, duly stamped, containing the names of the parties, the court, and the attorney, and, where a *præcipe* is required, (except for an original,) the nature and denomination of the process, and the return of it<sup>a</sup>; which *memorandum* or minute the said officer or his deputy shall receive, and forthwith enter or file of record, and shall sign thereon the day of delivering it." A similar *me-*

<sup>w</sup> 18 Eliz. c. 14.

<sup>z</sup> 25 G. III. c. 80. § 13.

<sup>x</sup> 4 & 5 Ann. c. 16. and *sep* &c.

<sup>y</sup> Will. 85,

<sup>a</sup> Append. Chap. V. [B.]

<sup>z</sup> Doug. 114.



*morandum* or minute is required, by the same act, previous to entering up judgment on a *cognovit actionem*, or warrant of attorney<sup>b</sup>.

An *infant*, or person under the age of twenty-one years, must sue by his *prochein amy*, or next friend<sup>c</sup>, unless where he sues as co-executor with others, in which case it is holden, that the executors of full age may appoint an attorney for themselves and the infant, as they make together but one representative<sup>d</sup>. And hence, he cannot be an informer upon a penal statute<sup>e</sup>; for by the 18 Eliz. c. 5. "every "informer upon a penal statute must exhibit "his suit *in proper person*, and pursue the same "only by himself or his attorney." An *infant defendant* must in all cases appear and defend by *guardian*, even where he is sued as co-executor, with others<sup>f</sup>. And if he appear by *attorney*, it is error<sup>g</sup>; though if an *infant plaintiff* appear by attorney, it is cured by the statutes of *jeofails*<sup>h</sup>.

To constitute a *prochein amy* or *guardian*, the person intended, who is usually some near relation, should come with the infant, before a

<sup>b</sup> Append. Chap. V. [C.]

<sup>f</sup> 2 Str. 784.

<sup>c</sup> Co. Lit. 135. b. 2 Inst. 261, 390. F. N. B. 27.

<sup>g</sup> 8 Co. 58. b. 9 Co. 30.

<sup>d</sup> 2 Saund. 212.

<sup>h</sup> 21 Jac. I. c. 13. 4 & 5 Ann. c. 16.

<sup>e</sup> Say. Rep. 51.

judge at his chambers ; or else a *petition*<sup>1</sup> should be presented to the judge, on behalf of the infant, stating the nature of the action, and, if for the defendant, that he is advised and believes he has a good defence thereto ; and praying, in respect of his infancy, that the person intended may be assigned him, as his *procbein amy* or guardian, to prosecute or defend the action. This petition should be accompanied with an *agreement*<sup>2</sup>, signifying the assent of the intended *procbein amy* or guardian, and an *affidavit*<sup>3</sup>, made by some third person, that the petition and agreement were duly signed. On being applied to in either of these ways, the judge will grant his *fiat*, upon which a rule or order should be drawn up, with the clerk of the rules, for the admission of the *procbein amy* or guardian : which admission is either *special*, to prosecute or defend a *particular* action, or *general*, to prosecute or defend *all* actions whatsoever<sup>m</sup> ; though it is said, that, by the practice of this court, a *special* admission of a *guardian*, to appear in one cause, will serve for others<sup>n</sup>.

<sup>1</sup> Append. Chap. V. [D.]

<sup>2</sup> *Id.* [E.]

<sup>3</sup> *Id.* [F.]

<sup>m</sup> 1 Str. 304.

<sup>n</sup> *Id.* 305.

The rule or order for the admission of a *prochein amy*, should be obtained before *declaration*, and a copy thereof annexed to it; or the defendant is not compellable to plead<sup>o</sup>: and the attorney for the plaintiff, if required, must give notice to the defendant's attorney, of the place of abode of the *prochein amy*<sup>p</sup>. In like manner, the rule or order for the admission of a *guardian* should be obtained before *plea*, and a copy of it annexed thereto; for if an infant defendant appear by attorney, though it be in consequence of common process, with a notice requiring him to appear in that manner, the plaintiff may obtain an order for striking out the appearance, and that the defendant appear by guardian, within a certain time, being usually four or six days; or in default thereof, that the plaintiff may be at liberty to name a guardian, to appear and defend for him<sup>q</sup>. And a similar order may be obtained, where the defendant neglects to appear at all<sup>r</sup>.

An infant *plaintiff* is not liable to costs, but only his *prochein amy*<sup>s</sup>; and if he refuse to pay them, on demand, he may be proceeded against

<sup>o</sup> Sty. P. R. 264.

<sup>p</sup> 1 Willf. 246.

<sup>q</sup> Barnes, 413, 418.

<sup>r</sup> 2 Str. 1076. 2 Willf. 50.

<sup>s</sup> Cro. Eliz. 33. 1 Str. 548. 2 Str. 708.

by attachment<sup>t</sup>. Yet, where an infant plaintiff was taken in execution for costs, the court refused to discharge him on motion<sup>u</sup>. And it has been adjudged, that costs are payable by an infant *defendant*<sup>v</sup>.

Heretofore, when a writ issued out of this court, it was entered upon a roll; so that though the officer had not returned the writ, yet the defendant might have appeared at the day given by the roll<sup>w</sup>; and that, either to save himself from corporal pain, by imprisonment, or to prevent the loss of issues, or to save his freehold or inheritance<sup>x</sup>. But at this day, the writ is seldom entered upon the roll, except to avoid the statute of limitations.

*Appearance* is the first act of the *defendant* in court<sup>y</sup>; and differs from putting in *bail*, which is the act of the court itself<sup>z</sup>, as is evident from the language of the bail-piece, wherein the defendant is stated to be *delivered* to bail<sup>a</sup>, &c. And it is either *voluntary* or *compulsive*. A *voluntary* appearance is of no effect, unless the plaintiff's attorney, within fourteen days after such appearance, sue out a writ of *latitat*, or

<sup>t</sup> Barnes, 128.

<sup>u</sup> 2 Str. 1217.

<sup>v</sup> Dyer, 104. 1 Bulst. 189. B. 1.

<sup>z</sup> Str. 1217.

<sup>w</sup> 1 Salk. 64.

<sup>x</sup> Co. Lit. 135. a.

<sup>y</sup> Com. Dig. tit. *Pleader*,

<sup>a</sup> 1 Salk. 8.

<sup>z</sup> 1 Atk. 239.



bill of Middlesex, where the defendant abides in that county<sup>b</sup>.

In actions by *original*, the appearance is entered with the *filacer* of the county where the action is brought<sup>c</sup>; and upon a summons, attachment, or *distringas*, it should be entered on or before the *quarto die post* of the return of the writ<sup>d</sup>. Upon a *capias*, or other process against the person, it is *common* or *special*; and answers to *common* or *special* bail, which will be treated of in the next chapter.

<sup>b</sup> R. T. 4 W. & M. reg. 1.

<sup>d</sup> *Id.* 67, 8.

<sup>c</sup> Trye, *in pres.*

## CHAP. VI.

## Of BAIL.

**B**AIL, in personal actions, originated with the *capias*<sup>a</sup>; and are common or special. Common bail must be filed in all actions by *bill*, where special bail are not necessary, or have been dispensed with by the court; and they are particularly required in *ejectment*, for the casual ejector<sup>b</sup>, and to authorize judgments by warrant of attorney, default, or *non sum informatus*<sup>c</sup>. These bail are merely *nominal*. *Special* bail, or bail above, are two or more<sup>d</sup> *real* and responsible persons, who undertake, generally, or in a sum certain, that if the defendant be convicted, he shall satisfy the plaintiff, or render himself to the custody of the marshal.

Before the making of the statute 12 Geo. I. c. 29. the defendant being always arrested, upon process against his person, it was discretionary in the court, to discharge him upon common, or hold him to special bail<sup>e</sup>. Anciently, if the

<sup>a</sup> Gilb. C. P. 33.<sup>4</sup> W. & M. II.<sup>b</sup> R. T. 14 Car. II, R. M.<sup>d</sup> Lofft, 252.

33 Car. II.

<sup>e</sup> R. M. 1654. § 9. Gilb.<sup>e</sup> R. H. 1 W. & M, R. T. K. B. 309. 2 Keb. 101.

cause

cause of action were under *twenty* pounds, the court let the defendant out of custody upon *common* bail; but if it were above twenty pounds, they made him find *special* bail<sup>f</sup>: Afterwards, the sum was reduced to *ten* pounds<sup>g</sup>: And now, by the last-mentioned statute, "no person shall be holden to special bail, upon any process issuing out of a *superior* court; nor, by 19 G. III. c. 70. upon any process issuing out of an *inferior* court; where the cause of action shall not amount to the sum of *ten* pounds or upwards." Since the making of these statutes, special or common bail is no longer discretionary in the court, but is governed by the *arrest*; it being a general rule, that wherever the defendant may be arrested, he may be holden to special bail; and *é converso*, that wherever the defendant cannot be arrested, common bail is sufficient.

Common bail may be filed, or a common appearance entered by the defendant or his attorney, or by the plaintiff according to the statute<sup>h</sup>. Where the defendant has been served with the copy of a bill of Middlesex, or other process in trespass, he should file common bail at the return

<sup>f</sup> Gilb. C. P. 35.

<sup>g</sup> *Id.* 36.

<sup>h</sup> 12 Geo. I. c. 29, and for

the origin of common bail, see Gilb. K. B. 309.

of it, or within *eight* days after such return<sup>1</sup>; which are reckoned exclusively, and Sunday is not accounted as one of them<sup>k</sup>. These bail are entered on a piece of stamped parchment, called a bail-piece<sup>l</sup>, which is filed with the clerk of the common bails; who, by a late rule<sup>m</sup>, is to mark the bail-pieces *numerically*, as they are received. The defendant, having been served with the copy of a *capias*, or other process by *original*, should enter a common appearance with the *filacer*, in the same number of days as he is allowed to file common bail<sup>n</sup>; reckoning them from the *essoinday*, and not from the *quarto die post* of the return of the process.

Where an *attorney* of either bench has accepted a warrant, or subscribed a process, declaration, or warrant to appear, the rule is, that "he shall

<sup>1</sup> Stat. 5 G. II. c. 27. § 1. This is the same time as was allowed to file common bail, upon an arrest, before the statute 12 Geo. I. c. 29. And if the defendant did not file it within that time, he was liable to the penalty of five pounds, to be paid to the plaintiff. Stat. 5 W. & M. c. 21. § 3. 9 & 10 W. III. c. 25. § 33. 5 Mod. 392. 1 Cl. Inst. 57. The rule for payment of

this penalty was absolute in the first instance; the words of the statutes being, that the court shall *immediately* award judgment, whereupon the plaintiff may take out execution. 2 Str. 737. Gilb. K. B. 369.

<sup>k</sup> 1 Bur. 56.

<sup>l</sup> Append. Chap. VI. [A.]

<sup>m</sup> R. E. 30 G. III. 3 T.R. 660.

<sup>n</sup> Stat. 5 G. II. c. 27. § 1.

" be



“ be compelled to cause an appearance, or liable  
 “ to an attachment, or put out of the roll, as the  
 “ case requires; and the party is not to be re-  
 “ ceived to countermand such appearance, after  
 “ his retainer<sup>o</sup>.” The usual mode of proceeding upon this rule is by attachment<sup>p</sup>; and if an attorney undertake to appear, the court will oblige him to do it in a proper manner: therefore, if he undertake to appear for an *infant*, he must appear by *guardian*<sup>q</sup>. And though he may have been imposed upon by the sheriff’s officer, yet the court will oblige him to fulfil his undertaking<sup>r</sup>.

Before the statute 12 Geo. I. c. 29. common bail could only have been filed, or a common appearance entered, by the defendant or his attorney. But now, by that statute, as altered by the 5 G. II. c. 27. “ If the defendant, having been  
 “ served with process, shall not appear at the re-  
 “ turn thereof, or within eight days after such  
 “ return, the plaintiff, upon *affidavit* of the ser-  
 “ vice of such process, made before a judge, or  
 “ commissioners of the court for taking affida-  
 “ vits, or before the proper officer for entering  
 “ common appearances, or his deputy, (and

<sup>o</sup> R. M. 1654. § 10. and  
 see Lofft, 192, 3. by which  
 it appears, that the under-  
 taking must be *signed*.

<sup>p</sup> 6 Mod. 42, 86.

<sup>q</sup> 1 Str. 114, 445.

<sup>r</sup> *Id.* 693.

<sup>s</sup> Append. Chap. VI. [R.]

“ which

" which affidavit shall be filed *gratis*,) may enter a common appearance, or file common bail, for the defendant; and proceed thereon, as if such defendant had entered his appearance, or filed common bail." Upon these statutes it has been holden, that common bail should be filed, by the plaintiff for the defendant, of the term in which the writ is returnable<sup>1</sup>. But it may be filed, as of that term, in a subsequent one, *nunc pro tunc*: And though judgment has been irregularly signed, without filing common bail for the defendant, according to the statute, till after the term succeeding that in which the writ was returnable, and after the judgment itself has been entered up, yet the defendant, having given a *cognovit*, is estopped from objecting to the irregularity; if the plaintiff has filed common bail *nunc pro tunc*, before the time of making the objection<sup>2</sup>.

For the better distinguishing by whom common bail shall have been filed, it is ordered, that " in all cases where common bail shall be filed by the plaintiff for the defendant, by virtue of the act, these words shall be written on the bail-piece, *viz.* '*filed according to the statute,*' " or words to the like effect<sup>3</sup>." And where the

<sup>1</sup> Caf. temp. Hardw. 138.

<sup>2</sup> T. R. 719, 20.

<sup>3</sup> 7 T. R. 206.

<sup>4</sup> R. M. 10 G. II. 2 Str.

1027. Caf. temp. Hardw.

207. S. C.

plaintiff

plaintiff files common bail for the defendant, on any day between the second and sixth of November; and he is in other respects entitled to sign judgment, it is signed as on the day preceding the effoin-day of Michaelmas term<sup>w</sup>. The plaintiff's attorney may enter a common appearance, or file common bail for the defendant, according to the statute, without entering or filing of record any *memorandum* or minute of the defendant's warrant, pursuant to the 25 Geo. III. c. 80: <sup>x</sup> But the defendant's attorney must not plead, or carry on any further proceedings in the action, until such *memorandum* or minute shall have been delivered to the proper officer, to be entered or filed of record, according to the directions of the act<sup>y</sup>.

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Where the defendant has been arrested, and discharged out of custody, upon giving bail to the sheriff, for his appearance at the return of the writ, he should regularly appear, if not surrendered<sup>z</sup>, and put in and perfect *special* bail to the action, or bail *above*; so called, in contradistinction to the sheriff's bail, or bail *below*.

<sup>w</sup> 5 T. R. 65.

<sup>z</sup> 6 T. R. 753. 7 T. R.

<sup>x</sup> See the statute, § 22. 122.

<sup>y</sup> *Id.* § 23.

Special

Special bail may also be put in by the defendant's attorney, in pursuance of his undertaking; or by the sheriff, or his bail<sup>a</sup>, for their own indemnity.

If the defendant be arrested in London or Middlesex, special bail should be put in within four days; or, if in any other county, within six days, exclusive, after the return of the process<sup>b</sup>, or *quarto die post* by original<sup>c</sup>. And if either the fourth or sixth day fall on a *Sunday*, the defendant has all the *Monday* following to put in bail<sup>d</sup>. But bail above may be put in on a *dies non juridicus*, as on the second of February, which is considered as a day for such business as is transacted at the judges' chambers<sup>e</sup>.

Before the statute 4 W. & M. c. 4. § 1. special bail could only have been put in before a judge in town. But this practice being found productive of great expence and inconvenience, it was enacted, by the above statute, that "the chief justice, and other the justices of the court of king's bench for the time being, or any two of them, whereof the chief justice for the time being to be one, shall or may, by one or more commission or commissions, under the seal of the said court, from time to time, as

<sup>a</sup> 2 Str. 876.

<sup>b</sup> R. M. 8 Ann. I.

<sup>c</sup> 4 T. R. 377.

<sup>d</sup> R. M. 8 Ann. I. (6).

<sup>e</sup> 2 Str. 702, 914.

<sup>f</sup> 5 T. R. 170.

" need



“ need shall require, empower such and so many  
“ persons, other than common attornies and so-  
“ licitors, as they shall think fit and necessary, in  
“ all and every the several shires and counties  
“ within the kingdom of England, dominion of  
“ Wales, and town of Berwick upon Tweed,  
“ to take and receive all and every such recog-  
“ nizance or recognizances of bail or bails, as  
“ any person or persons shall be willing or desir-  
“ ous to acknowledge or make before any of the  
“ persons so empowered, in any action or suit  
“ depending in the said court, in such manner  
“ and form, and by such recognizance or bail-  
“ piece, as the justices of the said court have used  
“ to take the same: which said recognizance or  
“ recognizances of bail or bail-piece, so taken as  
“ aforesaid, shall be transmitted to some or one  
“ of the justices of the said court, who, upon  
“ affidavit made of the due taking of the recog-  
“ nizance of such bail or bail-piece, by some cre-  
“ dible person present at the taking thereof, shall  
“ receive the same, upon payment of the usual  
“ fees: which recognizance of bail or bail-piece,  
“ so taken and transmitted, shall be of the like  
“ effect, as if the same were taken *de bene esse*,  
“ before any of the said justices.”

By the same statute<sup>f</sup>, “ the justices of the said  
“ court shall make such rules and orders, for the

<sup>f</sup> § 2.

“ justifying

“justifying of such bails, and making of the  
“same absolute, as to them shall seem meet; so  
“as the cognizor or cognizors of such bail or  
“bails be not compelled to appear in person in  
“the said court, to justify him or themselves;  
“but the same may, and is thereby directed to  
“be determined by affidavit or affidavits, duly  
“taken before the said commissioners, who are  
“thereby empowered and required to take the  
“same, and also to examine the sureties upon  
“oath, touching the value of their respective  
“estates; unless the cognizor or cognizors of  
“such bail do live within the cities of London  
“and Westminster, or within ten miles thereof.  
“And any judge of assize, in his circuit, shall  
“and may take and receive all and every such  
“recognizance and recognizances of bail or  
“bails, as any person shall be willing and desir-  
“ous to make and acknowledge before him;  
“which being transmitted in like manner, shall,  
“without oath, be received in manner as afore-  
“said, upon payment of the usual fees.”

Since the making of the above statute, special bail may be put in before a judge in town, a commissioner in the country, or a judge of assize in his circuit. Before a judge in town, they are put in at his chambers; and in actions by *bill*,

§ 3.

K

their

their recognizance is taken on a *bail-piece*<sup>b</sup>, made out by the defendant's attorney; stating the term, the *county* into which the writ issued<sup>i</sup>, and the names of the parties, together with the names and additions of the bail, and the sum sworn to. In actions by *original*, special bail are put in before a judge in town, with the *filacer* or his clerk; the defendant's attorney first making out and delivering to him a *note* in writing, answering to the *bail-piece* by bill<sup>k</sup>. The recognizance of bail by *bill* is general<sup>l</sup>, that if the defendant be condemned in the action, he shall satisfy the costs and condemnation money, or render himself to the custody of the marshal; or that the bail will pay the costs and condemnation money for him: And the *bail-piece* is left at the judge's chambers, until the bail are perfected. By *original*, the recognizance is taken in a penalty or sum certain, being double the amount of the sum sworn to<sup>m</sup>: But the plaintiff is not entitled to levy equitable costs, out of the penalty of the recognizance<sup>n</sup>.

Before a *commissioner* in the country, a *bail-piece* is made out, whether the action be by *bill*

<sup>b</sup> Append. Chap. VI. [C.] 2 Salk. 564.

<sup>i</sup> 7 T. R. 96.

<sup>m</sup> Trye, 121, 2.

<sup>k</sup> Trye, 67, 8.

<sup>n</sup> 2 Str. 826. 1 Barnard.

<sup>l</sup> 2 Bulst. 232. Cro. Jac. K. B. 125. S. C.

449, 645. Cro. Car. 481.

or *original*, and the recognizance taken thereon, in the same manner as in town, where the action is by *bill*<sup>o</sup>; and an *affidavit* of the due taking thereof should be made, either before the judge to whom the bail-piece is transmitted, or before a commissioner for taking affidavits<sup>p</sup>. In general, it is made before a commissioner, and annexed to the bail-piece<sup>q</sup>: But no such affidavit is necessary upon the transmission, where the bail is taken by a judge of assize in his circuit. The rule of court requires the bail-piece to be transmitted to the chief justice, or other judge of the court, in *eight* days, if taken within forty miles of London or Westminster, or, if taken above forty miles from London or Westminster, in *fifteen* days, after the taking thereof; unless all the judges are on their circuits, and then as soon as any one of them is returned<sup>r</sup>. But it is said, that notwithstanding this rule, the bail-piece must actually be filed with one of the judges on the *sixth* day after the return of the writ, or the bail-bond may be assigned<sup>s</sup>. And where the action is by *original*, the bail-piece being transmitted and allowed by

<sup>o</sup> R. T. 8 W. III. Reg. 3.

§ 1.

<sup>p</sup> *Id.* § 2. and see Append.

Chap. VI. [D.]

<sup>q</sup> R. T. 8 W. III. Reg. 3.

§ 2. (a).

<sup>r</sup> *Id.* § 3.

<sup>s</sup> Imp. K. B. 123.



the judge, should be filed with the *clerk* of the county where the action is laid<sup>1</sup>.

Special bail are absolute, or *de bene esse*<sup>2</sup>. They cannot be taken *absolutely*, without the consent of the plaintiff, or his attorney<sup>3</sup>; and when they are taken *de bene esse*, the defendant's attorney should give notice thereof in writing, without delay, to the plaintiff's attorney<sup>4</sup>. The notice of bail in town is, that they are put in; or, if taken before a commissioner, that the bail-piece is *filed*, with an affidavit of the *doe* taking thereof, at a judge's chambers<sup>5</sup>. The notice, in either case, should be properly *en- titled*<sup>6</sup>; and, where it is of bail put in, should set forth, with truth and certainty, their names<sup>7</sup>, degrees<sup>8</sup> or mysteries<sup>9</sup>, and places of abode, in

- <sup>1</sup> Imp. K. B. 438. 1 Crompt. " no bail, taken before a  
54. " judge in his chamber,  
" The origin of bail *de* " should bind the plaintiff,  
*bene esse* is thus related by " without his assent thereto,  
Glyn, Ch. J. " A bishop," " or the confirmation of such  
says he, " having arrested a " bail, taken by all the  
" man for a large debt, he " court." 2 Sid. 91.  
" tendered bail to justice Ri- " R. M. 1654. § 7, 8.  
" chardson, who took it in his " R. M. 16 Car. II.  
" chamber; and the bail be- " Append. Chap. VI. [E.]  
" ing insufficient, the bishop " Loft, 237.  
" represented the matter to " Id. 187.  
" parliament, and prayed " Id. 281.  
" their remedy for it: upon " Id. 187.  
" which it was enacted, that

order

order that the plaintiff may have an opportunity of inquiring after them\*. And the *parish*†, or town‡, wherein they live, without the *street*, or other certain place of their residence, is too vague a description. If the bail above are the same persons as were bail to the sheriff, it is usually so expressed in the notice§.

The plaintiff or his attorney, upon being served with this notice, either accepts of, or excepts to, the bail. If he *accepts* of them, the defendant's attorney should cause the bail-piece to be filed, with the master, within *twenty* days after such acceptance¶; But if he be not satisfied with the bail, he may *except* to them, and thereby compel a justification. If the bail to the sheriff become bail above, the plaintiff is not at liberty to except to them, after he has taken an assignment of the bail-bond‡: for by so doing, he has admitted them to be sufficient. And the delivery of a declaration *in chief* before special bail put in, is holden to be a waiver of the bail; and before justification, it is an acceptance of them¹. The

\* 6 Mod. 24.

† Lofft, 72, 194.

‡ *Per Cur. M.* 25 G. II.

§ *Imp. K. B.* 118.

¶ *R. T.* 13 Car. II.

‡ 1 Salk. 97. 7 Mod. 62, (a).

117. 6 Mod. 122. R. M.

8 Ann. Reg. 1. (c). R. E. 5

G. II. Reg. 1. (a).

¹ R. M. 8 Ann. Reg. 1.

(c). R. E. 5 G. II. Reg. 1.

plaintiff, however, may declare *de bene esse*, or conditionally, provided good bail be put in, or the bail already put in do justify<sup>\*</sup>: Though the demand or acceptance of a plea will, even then, be deemed a waiver of the bail, or justification<sup>1</sup>.

The exception to bail should be entered in the bail-book at the judge's chambers by *bill*<sup>m</sup>, or in the *filacer's* book by *original*<sup>n</sup>, within twenty days after notice of bail put in or filed<sup>o</sup>, and not afterwards<sup>p</sup>. If it be not entered within that time, then, "upon affidavit in writing of "such notice, on the back of the bail-piece, for "which affidavit no fee shall be taken, the bail "shall be filed, by the defendant's attorney, "within four days next after the end of the "twenty days<sup>q</sup>." The exception being entered, notice thereof should be given in writing, without delay, to the defendant's attorney<sup>r</sup>: and "if the notice be given in term-time, the defendant shall procure his bail to justify in four

<sup>\*</sup> R. M. 8 Ann. Reg. 1. 98. 6 Mod. 24.

{c}.

<sup>p</sup> R. M. 8 Ann. Reg. 2.

<sup>1</sup> Barnes, 92.

<sup>q</sup> R. M. 16 Car. II.

<sup>m</sup> R. M. 8 Ann. Reg. 2.

<sup>r</sup> R. M. 8 Ann. Reg. 2.

(a.) and see Append. Chap.

(a.) R. E. 2 G. II. R. E.

VI. [F.]

5 G. II. Reg. 1. 7 T. R.

<sup>n</sup> R. E. 2 Geo. II.

26. and see Append. Chap.

<sup>o</sup> R. M. 16 Car. II. R. T.

VI. [G.]

<sup>s</sup> W. III. Reg. 3. § 5. 1 Salk.

" days

"days *exclusive* after such notice; or shall add  
 "other bail, who shall justify within the said  
 "four days; but if such exception be en-  
 "tered in vacation, and notice thereof given  
 "in like manner, the bail put in, or other ad-  
 "ditional bail, shall justify upon the first day  
 "of the subsequent term".

Where the bail already put in do not mean to justify, others should be *added*<sup>1</sup>, before a judge, on the bail-piece by *bill*, or in the filacer's book by *original*, within the time allowed for their justification: and if there be not time enough, the defendant's attorney may take out a summons, and obtain an order for further time". When other bail are added, the court will order the names of those who were excepted to, and did not justify, to be struck out of the bail-piece: But until this be done, they are liable to be proceeded against<sup>2</sup>: And if it be not done, until after proceedings have been had against them, they must pay the costs of such proceedings<sup>3</sup>. On an exception to bail, if notice be given of other bail, only one of whom justifies, and the names of the former

<sup>1</sup> R. E. 5 G. II. *Reg.* 1. 337. S. C.

<sup>2</sup> Imp. K. B. 119, 120.

<sup>3</sup> Say. Rep. 308, 9.

<sup>4</sup> 1 Crompt. 64, 65, 88,  
 &c.

<sup>5</sup> 1 Blac. Rep. 463. 4  
 Bur. 2107.

<sup>6</sup> Say. Rep. 58. 1 Will.



still remain on the bail-piece, the first bail may surrender the principal<sup>7</sup>.

Previous to the justification of bail, there should be a *notice*, setting forth that the bail already put in will, on a certain day, justify themselves in open court, or that one or more bail will be added, and justify themselves as good bail for the defendant<sup>8</sup>: And if the bail were put in before a commissioner, the notice should express that they will justify themselves by affidavit<sup>9</sup>. Notice of justification by *three* bail has been holden good<sup>10</sup>; but notice that A. B. and C. or *two* of them will justify, is irregular<sup>11</sup>. Where the bail already put in intend to justify, *one* day's previous notice of justification, or notice for the next day, is deemed sufficient<sup>12</sup>; unless Sunday intervene, and then notice must be given on Saturday for Monday. But where other bail are added to those already put in, there must be *two* days previous notice of justification, one inclusive and the other exclusive, as Monday for Wednesday, &c.<sup>13</sup> And Sunday is not reckoned a day for this purpose:

<sup>7</sup> 5 T. R. 633.

<sup>8</sup> Imp. K. B. 119.

<sup>9</sup> Append. Chap. VI. [H.]

<sup>10</sup> *Id. ibid.* Per Cur. M.

<sup>11</sup> *Id.* [I.]

<sup>12</sup> 21 G. III.

<sup>13</sup> Loft, 26.

there-

therefore notice of added bail on Saturday for Monday is not sufficient\*.

The justification of bail is either in *person* or by *affidavit*. Where the bail are put in before a judge in town, whether by bill or original, they must *personally* appear in *court*; or, by consent<sup>f</sup>, before a *judge* at his chambers; and, in order to justify themselves, must swear that they are house-keepers or freeholders, and respectively worth double the sum sworn to, after all their debts are paid, or exclusive of all debts or demands, due from them to any person or persons whatsoever<sup>g</sup>. For the purpose of taking the justification of bail, &c. one of the judges of the court sits during term-time, every morning at half past nine o'clock; and no bail is permitted to justify after ten o'clock<sup>h</sup>. Bail put in before a commissioner must justify themselves in the same manner, where they live in *London* or *Westminster*, or within ten miles thereof<sup>i</sup>. But where they live at a greater distance, they may be justified, without their personal attendance, by *affidavit*, duly taken before the commissioner, of their being

\* Case of *Querton's* bail, § 5. (c). R. E. 5 Geo. II. M. 26 G. III. Imp. K. B. Reg. 1. (b).

125, 6.

<sup>h</sup> R. T. 35 G. III.

<sup>f</sup> 6 Mod. 24. R. E. 5 G. II. 1. (b).

<sup>i</sup> Stat. 4 & 5 W. & M. c. 4. § 2.

<sup>g</sup> R. T. 8 W. III. Reg. 3.

house-

housekeepers, &c.\* This affidavit is usually annexed to the bail-piece, and a copy of it delivered to the plaintiff's attorney, at the time of giving him notice of the bail-piece being filed; after which, if an exception be entered, which seldom happens, the affidavit must be produced, and read in court, as a justification, upon notice given thereof, and an affidavit of the service of such notice<sup>1</sup>.

When the bail are to be justified in court, an affidavit must be made of the service of notice of justification<sup>m</sup>, and delivered to counsel, with instructions for him to move to justify them<sup>n</sup>. If they are not present at the sitting of the court, they must wait till it is rising<sup>o</sup>: and the judge's clerk attending with the *bail-piece*, or the *filacer* with his bail-book, they are allowed to justify, as a matter of course; unless they are *opposed* by counsel, *viva voce*, or, if taken before a commissioner, upon cross affidavits.

The following are among the various grounds of opposing bail: *first*, that there is some defect in the *form*, or irregularity in the *service*, of the notice of bail or justification<sup>p</sup>. *Secondly*, That

\* Stat. 4 & 5 W. & M. c. 4. § 2. R. T. 8 W. III. Reg. III. § 5. R. E. 5 G. II. Reg. 1. (b). and see Append. Chap. VI. [K.]

<sup>1</sup> Imp. K. B. 124, 5.

<sup>m</sup> Append. Chap. VI. [L.]

<sup>n</sup> Imp. K. B. 121.

<sup>o</sup> Lofft, 88.

<sup>p</sup> *Ante*, 132, 3. 136.

they have assumed names that are either *feigned*, or belong to other persons. If they assume *feigned* names, the court will order them, and the attorney, to be set on the pillory<sup>1</sup>. And "if any person shall acknowledge, or procure to be acknowledged, any recognizance or bail, in the name of another person, not privy or consenting to the same<sup>2</sup>; or, before a commissioner, shall represent or *personate* another person, whereby he may be liable to the payment of any debt or damages<sup>3</sup>; he shall, on conviction, suffer death as a felon, without benefit of clergy<sup>4</sup>:" But the court will not vacate the proceedings against the party personated, until the offender be convicted<sup>5</sup>; nor can a conviction take place, until the bail-piece be filed<sup>6</sup>. A *third* ground of opposing bail is, that they are not *housekeepers*: If they be, the rent of their houses is immaterial, though under ten pounds<sup>7</sup>; nor is it necessary that they should have been assessed to the poor's rate<sup>8</sup>. *Fourthly*, they may be opposed on the ground of their not being worth double the sum sworn to, after payment

<sup>1</sup> 1 Str. 384.<sup>3</sup> Keb. 694. 1 Ld. Raym.<sup>2</sup> Stat. 21 Jac. I. c. 26. 445.

§ 2.

<sup>4</sup> 2 Sid. 90.<sup>5</sup> Stat. 4 & 5 W. & M.<sup>7</sup> Loft, 148.

c. 4. § 4.

<sup>6</sup> *Id.* 328.<sup>8</sup> T. Jon. 64. 1 Vent. 301.



of all their debts. Upon this ground, *bankrupts* may be objected to, who have not obtained their certificates; or such as have been twice bankrupts, and not paid fifteen shillings in the pound<sup>\*</sup>. And bail have been rejected, who did not know the defendant<sup>†</sup>, or had been bail before, but did not know in how many actions, or for what sums<sup>‡</sup>: But it seems, that the circumstance of not knowing the defendant, being only a mark of suspicion, may be explained away. *Fifthly*, *foreigners* are not admitted to be bail, merely in respect of property *abroad*, which is not liable to the process of this court<sup>§</sup>. Though it has been said, that merely having no property in *England* is not of itself a sufficient objection, without other auxiliary circumstances<sup>¶</sup>. *Sixthly*, it is a general rule, that “no *attorney* of this or “any other court shall be bail, in any action or “suit depending in this court<sup>‡</sup>.” This rule, which was calculated for the benefit of attornies, has been extended to their *clerks*<sup>d</sup>. And it is also a rule, founded on principles of prudent jea-

<sup>\*</sup> *Mountain v. Wilkins*, M. see 2 Blac. Rep. 1323, 4.

21 G. III.

<sup>c</sup> R. M. 1654. § 1. R. M.

<sup>†</sup> *Per Cur.* M. 26 G. III. 14 G. II. *Reg.* 1.

<sup>‡</sup> Lofft. 72, 194.

<sup>d</sup> Cowp. 828. Doug. 466.

<sup>§</sup> 4 Bur. 2526, 7. Lofft, 1 H. Blac. 76. 2 H. Blac,

34. 147.

350.

<sup>¶</sup> 1 Blac. Rep. 444. and

lously, that "no sheriff's officer, bailiff, or other person concerned in the execution of process, be permitted to be bail, in any action or suit depending in this court:" This latter rule has been applied to the keeper of the *poultry compter*<sup>†</sup>, and *marshalsea court* officers<sup>‡</sup>. But if a person who, by the rules of the court, is not permitted to become bail, be put into the bail-piece, and not excepted to, the plaintiff cannot take an assignment of the bail-bond, and proceed upon it, as if no bail had been put in<sup>§</sup>. Bail may be asked, whether they have not been in the pillory for *perjury*<sup>¶</sup>: And they are liable to the punishment of this offence, if in any respect they forswear themselves<sup>||</sup>.

Where the bail do not attend, or are not permitted to justify, on account of a defect in the notice of bail or justification, the court will, in general, allow them further time to justify<sup>¶</sup>. But where they are rejected, on account of some personal insufficiency, the court will seldom allow further time to add and justify others<sup>||</sup>. And

<sup>\*</sup> R. M. 14 G. II. *Reg.* 2. 22 G. III. cited in *Doug.* 2 Str. 890. 1 Barnard. K. B. 466.

417. *Lofft*, 153. 2 *Blac.* Rep. 799.

<sup>†</sup> *Doug.* 466.

<sup>‡</sup> *Per Cur.* T. 18 G. III.

<sup>§</sup> *Thomson v. Roubell, E.*

<sup>¶</sup> 4 T. R. 440.

<sup>||</sup> *Cro. Car.* 146.

<sup>¶</sup> *Lofft*, 72, 187. *Per Cur.*

M. 25 G. III.

<sup>||</sup> *Per Cur.* T. 24 G. III.

in all cases, where a motion is made for giving further time to justify bail, it must be supported by an affidavit of the special facts, alledged in excuse of the bail not attending, at the time mentioned in the notice of justification; or in case further time be given, upon suggestion of counsel, then the bail shall not be permitted afterwards to justify, unless at such given time, such an affidavit be produced as before described<sup>a</sup>. If the bail do not justify at the time appointed, and no further time is given, they are out of court<sup>o</sup>; and cannot afterwards surrender the principal<sup>p</sup>.

When the bail are *allowed*, a rule or order of allowance should be drawn up, with the clerk of the rules, and a copy of it served on the plaintiff's attorney, even though he has opposed their justification<sup>q</sup>: after which, the bail-piece should be obtained from the judge's chambers, and filed with the master. In filing the bail, it should be observed, that every bail taken on or before the continuance day is a bail, and to be filed of the *preceding* term; and every bail taken after the continuance day is a bail, and to be filed of the *subsequent* term<sup>r</sup>: but

<sup>a</sup> R. M. 36 G. III.

<sup>r</sup> R. E. 5 G. II. Reg. 1. (b).

<sup>o</sup> 1 Crompt. 66. 7 Mod. 50.

And as to the *continuance* day,

<sup>p</sup> 7 T. R. 297.

see R. E. 11 W. III. Reg. 2.

<sup>q</sup> 4 T. R. 493.

2 Str. 1215.

where

where new bail are added to other bail taken on or before the continuance day, the new bail shall be taken and filed as of that term, in which the first bail was put in\*.

Such are the means of putting in and perfecting bail above, where the defendant is *at large*, in order to prevent an assignment of the bail-bond, or proceedings against the sheriff. Bail above may also be put in and perfected, at any time pending the action, where the defendant is in *custody* of the sheriff or marshal.

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Before we dismiss the subject of bail, it will be proper to notice how far they are *liable*; and when, and in what manner, they may be *discharged*, by the render of their principal, &c.

The ancient course of the court was, that if a man became bail for another upon a *latitat*, &c. in any sum of money, however trifling, he was bail for him, in all actions brought by the same plaintiff, during the same term, were the sums ever so great†. To rectify this extraordinary practice, a rule was made, that if the plaintiff should declare against the

\* R. E. 5 G. II. Reg. 1. † Cro. Jac. 449. 2 Sid. (b). 1 Salk. 100. *semb. contra.* 163. 1 Mod. 16.

defendant,



defendant, upon any bail by him put in, for a *greater* sum than was expressed in the process, upon which the defendant was arrested, then the bail so put in should not be chargeable in that action\*. Still, however, the bail were liable to all actions, wherein the plaintiff declared for, and recovered a *less* sum, than was expressed in the process\*; and where he declared for, and recovered a *greater* sum, the bail were totally discharged\*. At length it was resolved, that as, on the one hand, there was no colour to subject the bail to more than they were bound in, let the plaintiff's demand be ever so much more; so, on the other hand, there was no reason why the plaintiff should suffer by his moderation in taking bail; but the recognizance should be considered as an agreement, to pay to the extent of the sum sworn to, or render the defendant\*. And, accordingly, it is now settled, that where the plaintiff declares for or recovers a *greater* sum than is expressed in the process, upon which he declares, the bail shall not be discharged; but be liable for so much as is sworn to, and indorsed on the process, or for any less sum, which the plaintiff in such action

\* R. T. 22 Car. II. 6  
Mod. 267.

\* 3 Keb. 16.

\* 6 Mod. 266. 1 Salk.  
102. S. C.

\* 2 Str. 922.

shall

shall recover<sup>7</sup>, together with the costs of the original action<sup>8</sup>; and they are not liable to pay the costs of a writ of error<sup>9</sup>.

Prior to the return of the writ in the original action, the defendant, not being delivered by the court into the custody of his bail, cannot render himself, or be rendered in their discharge<sup>1</sup>. But subsequent to the return of it, he may render himself, or be rendered, in their discharge, either before or after judgment<sup>2</sup>, at any time before the rising of the court, on the return day of the second *scire facias*, or of the first, where a *scire feci* is returned, by *bill*<sup>3</sup>; or by *original*, at any time before the rising of the court, on the appearance day, or *quarto die post* of the return of the second *scire facias*<sup>4</sup>, or of the first, where a *scire feci* is returned<sup>5</sup>, and not after<sup>6</sup>. And there

<sup>7</sup> R. E. 5 G. II. Reg. 2. above; as sheriff's bail may  
Lofft, 545. Doug. 330. render the defendant before

<sup>8</sup> The rule of E. 5 G. II. the return of the writ.  
is silent as to the costs. But 6 T. R. 753. 7 T. R. 122.  
in the case of *Peterken v.* <sup>1</sup> 1 Str. 198.

*Sampson* and another, M. 25 <sup>4</sup> 1 Ld. Raym. 157. 6  
G. III. it was determined by Mod. 238. 8 Mod. 340.

the court, that the bail are R. T. 1 Ann. II. (a). R. E.  
liable to pay them, as well as 5 G. II. Reg. 3. (a).

the sum sworn to. <sup>1</sup> 1 Wils. 270.

<sup>2</sup> 6 T. R. 288.

<sup>3</sup> 4 Bur. 2134.

<sup>4</sup> Barnes, 88, 9. This <sup>5</sup> 3 Bur. 1360. 1 Blac.  
must be understood of bail Rep. 393. S. C.

is no occasion for the bail to justify, in order to render, even after they are excepted to; or though the sheriff has been ruled to bring in the body<sup>h</sup>. They are also, by several late determinations<sup>i</sup>, allowed to render the defendant, without justifying, after the time allowed for justification is expired, and even after an assignment of the bail-bond, or the sheriff has been fixed. But it seems, that bail are not in a condition to make any motion to the court, until they have justified<sup>k</sup>.

It was anciently the course of the court, not to allow a render, after the return of *non est inventus*, to a *capias ad satisfaciendum*<sup>l</sup>. But a great mischief resulted from this practice; for the plaintiff would sue out a *capias*, returnable the next day, so that the bail had little or no time to bring in the body<sup>m</sup>: To remedy which, the judges indulged the bail so far, as to permit them to render the body, upon the return of the first *scire facias*, if the *capias* were returnable *de die in diem*<sup>n</sup>; but if it were returnable the next term, the bail

<sup>h</sup> *Ashton v. King and another*, M. 21 G. III. R. T. 7 T. R. 297.

<sup>i</sup> 33 G. III. 5 T. R. 368. <sup>k</sup> 7 T. R. 226.

*Barnes*, 111, 117. 2 Blac. <sup>l</sup> Cro. Eliz. 738.

Rep. 758, 1179, 80. <sup>m</sup> 1 Ld. Raym. 157.

<sup>n</sup> 5 T. R. 401, 534, 633. <sup>o</sup> Cro. Eliz. 618.

were strictly holden to render the principal, by the return of it\*. *Popbam*, Ch. J. extended this indulgence still farther; and permitted the bail to render, any time before the return of the second *scire facias*, or upon the return, *sedente curia*°. This practice, however, appears to have been disallowed by lord *Coke*¹: But it was soon after revived, in the time of *Croke*, Ch. J.², and is now fully established.

If the plaintiff proceed by action of *debt* on the recognizance, the render may be made by the space of *eight* intire days, in full term, next after the return of the *latitat*, or other process against the bail³. And if an action be brought here against bail, on a recognizance taken in the Common Pleas, they have the same time allowed them for rendering the principal, as if the recognizance had been taken in this court⁴. Where an action was commenced, and afterwards discontinued, and then the bail rendered the principal, before the bringing of a new action, the court held the render to be good, it being before the return of the process in this suit; and

\* Cro. Eliz. 738.

334. 8 Mod. 32.

¹ Cro. Jac. 109.

² R. T. 1 Ann. Reg. 1.

³ Moor, 850. 3 Bulst. 182.

⁴ Salk. 101. 1 Ld. Raym.

S. C.

721. 6 Mod. 132.

⁵ W. Jon. 139. Sty. Rep.

⁶ 7 T. R. 355.



that it was the fault of the plaintiff, not to begin right at first<sup>u</sup>.

Before the return of the *capias ad satisfaciendum*, the render is a matter of right, and may be pleaded<sup>v</sup>. But afterwards it is allowed, by the grace and favour of the court<sup>w</sup>, and not *ex debito justitiæ*; for the condition of the recognizance is broken, upon the return of *non est inventus* to the *capias*: And therefore a subsequent render cannot be pleaded<sup>x</sup>; though, if made in time, the bail may be relieved by motion. If the bail, at any time after the return of the *capias*, render the principal at a judge's chambers, and he is committed to the tipstaff, from whom he escapes or is rescued, that will not be a good render<sup>y</sup>; for the court will not suffer the plaintiff to be prejudiced, by their indulgence to the bail.

Where the defendant is *at large*<sup>z</sup>, he may come and render himself, or be taken and rendered by his bail, either in *court*, if sitting, or before a *judge* at his chambers; and the court or judge will make an entry, or minute of the render<sup>a</sup> and commitment, and cause the defendant

<sup>u</sup> 2 Str. 915.

<sup>v</sup> 1 Ld. Raym. 156, 7.

<sup>w</sup> R. T. 1 Ann. Reg. 2. (a).

<sup>x</sup> *Kesley and Medley*, M.

<sup>z</sup> 4 G. III. Barnes, 106, 7.

<sup>y</sup> 6 Mod. 238. R. T. 1 Ann.

Reg. 2. (a).

<sup>a</sup> 6 Mod. 231.

<sup>a</sup> R. T. 3 Ann.

to be sent therewith, in custody of a tipstaff, to the King's Bench prison. But where the defendant is already a *prisoner*, he must be brought up by writ of *habeas corpus cum causa*, which may be made returnable *immediatè*<sup>b</sup>; and upon this writ, (which may be granted, as well where the defendant is in custody on a criminal charge, as under civil process,) the court will either remand the defendant to his former custody, or commit him, as a prisoner of the court, to the custody of the marshal. Under every commitment, should be entered the state of the cause, at the time of the render: If before declaration, *the sum sworn to* on the arrest; but if after declaration, these words should be added, *declaration filed or delivered, issue, or interlocutory judgment signed*, as the case is: If after final judgment in debt, *the debt and damages*; in other cases, *the quantum of the damages*<sup>c</sup>.

Formerly, if the defendant had become *bankrupt*, and obtained his certificate, before the bail were fixed, the method was, for the bail to surrender him; and then for the defendant to apply to be discharged, upon an affidavit, stating his having become bankrupt, since the cause of action arose, and obtained a certificate of his con-

<sup>b</sup> 3 Bur. 1875.

<sup>c</sup> R. E. 8 G. III.

formity to the commission<sup>d</sup>. But of late, where a bankrupt is clearly entitled to his discharge, the court, to avoid circuity, have ordered an *exoneretur* to be entered on the bail-piece, without the form of a regular surrender by his bail<sup>e</sup>.

The defendant being rendered, notice thereof should be given, without delay, to the plaintiff's attorney<sup>f</sup>, and an *affidavit* made of the service of such notice<sup>g</sup>, to the end that the plaintiff, if he think proper, may charge the defendant in execution, or at least that he may not be at any further trouble or expence, in proceeding against the bail. If the plaintiff therefore, through want of notice, continue to proceed against the bail, though this will not vitiate the render, yet they shall not be relieved, until they have paid the charges<sup>h</sup>. But the notice need not be given before the rising of the court, on the day of the render<sup>i</sup>.

The next step to be taken, in order to discharge the bail, is to enter an *exoneretur* on the bail-piece<sup>k</sup>; to effect which, the bail-piece, if not already got, should be obtained from the judge's chambers, and a certificate<sup>l</sup> from the pri-

<sup>d</sup> Cowp. 824.

<sup>e</sup> *Id. ibid.*

<sup>f</sup> Append. Chap. VI. [M.]

<sup>g</sup> R. T. 1 Ann. Reg. 2. 6 Mod. 238. 8 Mod. 281.

<sup>h</sup> Bac. Abr. 420, 421. and

see Append. Chap. VI. [N.]

<sup>i</sup> *Id. ibid.*

<sup>j</sup> *Per Cur.* H. 26 G. III.

<sup>k</sup> Imp. K. B. 410.

<sup>l</sup> R. T. 3 Ann. (a).

son, that the defendant is in custody: these being carried to the master, he will enter an *exoneretur* on the bail-piece, which should then be filed; for if the bail-piece be filed, without an *exoneretur*, the bail remain liable, though the defendant be actually in prison<sup>m</sup>. Yet, where the bail-piece has been previously delivered out to be filed, to the plaintiff's attorney, who neglects to file it, he cannot proceed against the bail, for want of an *exoneretur*<sup>n</sup>. And where the render is in other respects regular, the court will order an *exoneretur* to be entered on the bail-piece, upon paying the costs that have accrued, subsequent to the render<sup>o</sup>.

The only remaining circumstance necessary for discharging the bail, is to make an entry of the render in the marshal's book, kept in the King's Bench office<sup>p</sup>; it being holden, that until such entry be made, the defendant is not in custody, so as to charge the marshal, in an action of escape<sup>q</sup>.

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<sup>m</sup> R. T. 1 Ann. Reg. 2.    <sup>o</sup> Say. Rep. 7, 8.    1 Bur.  
 (a). 1 Salk. 98.    8 Mod. 409.  
 282.    <sup>p</sup> R. T. 3 Ann. (a).  
<sup>n</sup> 8 Mod. 280.    Barnes,    <sup>q</sup> 1 Salk. 272, 3.    2 Str.  
 68. S. P.    1215, 1226.    2 Bur. 1049.



If the plaintiff declare against the defendant, for a *different* cause of action from what is expressed in the process<sup>1</sup>; or affidavit to hold to bail<sup>2</sup>; or, by *original*, in a *different* county from that where the action is brought<sup>3</sup>; his bail are discharged: And they are also discharged, where the defendant *dies*<sup>4</sup>, is made a *peer* of the realm<sup>5</sup>, or *member* of the house of commons<sup>6</sup>, or becomes *bankrupt* and obtains his certificate<sup>7</sup>, &c. at any time pending the action: And in any of these cases, the court, on motion, will order an *exoneretur* to be entered on the bail-piece. So if a defendant be sent out of the kingdom, under the *Alien-bill*<sup>8</sup>, the court will permit the bail to enter an *exoneretur*; unless they are indemnified, or have money in their hands belonging to the defendant, sufficient to answer the plaintiff's demand<sup>9</sup>. And they will also permit an *exoneretur* to be entered, where the defendant is under sentence of transportation for a felony<sup>10</sup>.

<sup>1</sup> 2 H. Blac. 278.

<sup>7</sup> Doug. 45.

<sup>2</sup> 6 T. R. 363. 7 T. R. 80.

<sup>8</sup> *Langridge* one &c. v. *Flood* Esq. H. 26 G. III.

<sup>3</sup> 3 Lew. 235. R. E. 2 G. II. (a).

<sup>5</sup> 1 Bur. 244, 5. 436. Cowp. 824.

<sup>4</sup> But if the defendant die, after the return of the *ca. sa.* and before it is filed, the bail are fixed. 6 T. R. 284.

<sup>9</sup> 33 G. III. c. 4.

<sup>10</sup> 6 T. R. 50, 52, 246.

<sup>11</sup> *Id.* 247.

But where the defendant was in custody, under a charge of murder committed in *Ireland*, where a bill was found by the grand-jury against him, and application had been made to the secretary of state, to send him over there, in order to take his trial; the court, though they granted a *habeas corpus* to bring him up, in order that he might be surrendered by his bail, would not, without an actual surrender, allow an *exoneretur* to be entered on the bail-piece<sup>b</sup>. We have already seen<sup>c</sup>, that the court will not discharge the bail, on the ground of the insanity of their principal. And a *cognovit* by the principal, without notice to the bail, does not discharge them<sup>d</sup>.

<sup>b</sup> 7 T. R. 226.

<sup>c</sup> *Ante*, 65.

<sup>d</sup> 5 T. R. 277.

## C H A P. VII.

*Of the PROCEEDINGS upon the BAIL-BOND; and against the SHERIFF, to compel him to return the Writ, and bring in the Body.*

**I**F bail above, when necessary, be not put in and perfected in due time, the bail-bond is forfeited; and the plaintiff may either take an *assignment* of it, or proceed against the *sheriff*, to compel him to return the writ, and bring in the body of the defendant<sup>a</sup>. If the bail below be sufficient, it is usual for the plaintiff to take an assignment of the bail-bond; which it seems he cannot do, after service of the rule to bring in the body<sup>b</sup>. But by taking an assignment, he discharges the sheriff<sup>c</sup>; and if the same bail be put in above, he cannot except against them<sup>d</sup>: And therefore if the plaintiff be dissatisfied with the bail below, he should proceed against the sheriff.

Before the statute for the amendment of the law<sup>e</sup>, the sheriff was not compellable to assign

<sup>a</sup> Gilb. C. P. 20.

and *Jacqués*, M. 24 G. III.

<sup>b</sup> Imp. K. B. 148, 159.

<sup>d</sup> *Ante*, 133. R. M. 6 G.

<sup>c</sup> Gilb. C. P. 21. 1 Salk.

II. Reg. 2. C. B. *contra*.

99. 1 Will. 223. *Williams*

<sup>e</sup> 4 & 5 Ann. c. 16. § 20.

the bail-bond<sup>f</sup>; though if he had not assigned it, the court would have amerced him<sup>g</sup>: and the old way was, first to give a rule for the sheriff to bring in the body, before the plaintiff could take an assignment of the bail-bond<sup>h</sup>. Another mischief at common law was, that after an assignment of the bail-bond, the action thereupon must have been brought in the name of the sheriff, who might have released it, and thereby driven the plaintiff into a court of equity<sup>i</sup>. To remedy these inconveniences it was enacted, by the above statute, "that if  
 "any person or persons shall be arrested, by  
 "any writ, bill, or process, issuing out of any  
 "of the courts of record at Westminster, at  
 "the suit of any common person, and the  
 "sheriff or other officer take bail from such  
 "person, against whom such writ, bill, or  
 "process is taken out, the sheriff or other of-  
 "ficer, at the request and costs of the plaintiff  
 "in such action or suit, or his lawful attorney,  
 "shall assign to the plaintiff in such action the  
 "bail-bond, or other security taken from such  
 "bail, by indorsing the same, and attesting it  
 "under his hand and seal in the presence of  
 "two or more credible witnesses, which may be

<sup>f</sup> 1 Mod. 228.<sup>g</sup> 1 Sid. 23. 2 Mod. 84.<sup>h</sup> 1 Salk. 99.<sup>i</sup> Gilb. C. P. 21.

" done



“ done without any stamp ; provided the assign-  
 “ ment so indorsed be duly stamped, before any  
 “ action be brought thereupon : and if the said  
 “ bail-bond or assignment, or other security  
 “ taken for bail, be forfeited, the plaintiff in  
 “ such action, after such assignment made, may  
 “ bring an action and suit thereupon in his own  
 “ name : and the court where the action is  
 “ brought, may, by rule or rules of the same  
 “ court, give such relief to the plaintiff and de-  
 “ fendant in the original action, and to the bail,  
 “ upon the said bond, or other security taken  
 “ from such bail, as is agreeable to justice and  
 “ reason ; and that such rule or rules of the  
 “ said court shall have the nature and effect  
 “ of a defeazance to such bail-bond, or other  
 “ security for bail.”

Upon this statute, it has been said, the bail-  
 bond may be assigned *before* it is forfeited, though  
 it cannot be put in suit till afterwards\*. And  
 where the defendant had neglected to put in and  
 perfect bail above, the court held that the plain-  
 tiff was not out of court, by omitting to declare  
 in the original action, within two terms after the  
 return of the writ ; but he might still take an  
 assignment of the bail-bond<sup>1</sup> : for he was not

\* Barnes, 77.

Imp. K. B. 150. Prac. Reg.

<sup>1</sup> 2 Str. 1262. *Carmichael*

71. 2 Blac. Rep. 876. C. B.

*v. Trautbeck*, T. 24 G. III.

*contra.*

bound

bound to declare *de bene esse*, within the time limited for the defendant's appearance, and after that time he could not declare, until the defendant had actually appeared.

The assignment may be made by the high-sheriff, or by the under-sheriff in *his* name; but not by the under-sheriff's clerk<sup>m</sup>. And as the assignment may be made, so the action may be brought, in any county<sup>n</sup>. But it must necessarily be brought in the *same* court, from whence the process issued, on which the bail-bond was taken<sup>o</sup>: otherwise the parties could not have the relief intended by the statute. And the assignment must be *stamped*, before the bringing of the action<sup>p</sup>.

The proceedings on the bail-bond may be *set aside*, if irregular; or *stayed*, if regular, upon terms, in order that there may be a trial in the original action. The causes of irregularity are as various, as the different proceedings out of which they arise. In a late case<sup>q</sup>, the assignment of the bail-bond was set aside, as having

<sup>m</sup> 1 Str. 60. 10 Mod. 288. the bail bond, by the assignee of  
<sup>n</sup> 2 Str. 727. 2 Ld. Raym. the sheriff; as the sheriff him-  
 1455. S. C. self may sue thereon in a dis-  
<sup>o</sup> 1 Bur. 642. 3 Bur. 1923. ferent court. 1 H. Blac. 631.  
 3 Wils. 348. 2 Blac. Rep. <sup>p</sup> *Ante*, 156.  
 838. S. C. This rule only <sup>q</sup> 4 T. R. 176.  
 applies to actions brought on

been

been made pending a rule to set aside proceedings for irregularity, *and to stay proceedings in the mean time*; the proceedings being suspended thereby for all purposes, till the rule was discharged. But the court will not order the bail-bond to be delivered up to be cancelled, on the ground of a misnomer<sup>\*</sup>.

Where the plaintiff has not lost a trial, the court, or a judge, will stay the proceedings on the bail-bond, upon putting in and *perfecting* bail above; paying the costs incurred by the assignment of the bail-bond, to be taxed by the master; receiving a declaration in the original action; pleading issuably, and taking short notice of trial, so that the cause may be tried the same term<sup>\*</sup>. And wherever the defendant is guilty of a neglect, in not putting in bail in due time, by which the bail-bond becomes forfeited, the notice (in case the party means to put in bail, in order to stay proceedings upon the bail-bond), should be, that he will put in and *perfect* bail on such a day; when the plaintiff may oppose them in court, without its being a waiver of the bail-bond<sup>†</sup>. But if the plaintiff have lost a trial, the court will further require an affidavit of merits, and that

<sup>\*</sup> 3 T. R. 572.

Cowp. 71.

<sup>†</sup> R. M. 8 Ann. Reg. 1. (c).

<sup>‡</sup> Cowp. 769.

the bail consent, that the bail-bond shall stand as a security. The rule *nisi*, or summons, to set aside the proceedings, is *entitled* in the original action<sup>u</sup>; and when the rule is made absolute, or a judge's order obtained upon the summons, it is incumbent on the defendant immediately to get an appointment thereon, from the master, to tax the costs, and to serve a copy of it upon the plaintiff's attorney; and when the costs are taxed, to pay the same without delay<sup>v</sup>.

The sheriff's bail are liable to pay what is really due to the plaintiff, though beyond the sum sworn to and costs, to the full extent of the penalty of the bond<sup>w</sup>: And each of them is liable for his own costs, as well as those of the original action. And where *several* actions are brought, it is usual, in suing out execution, to apportion the debt and costs in the original action, amongst the different defendants, so as to levy a part on each, together with his own costs. But if the *plaintiff* die after the arrest, and before the return of the writ, the court will set aside proceedings on the bail-bond<sup>x</sup>. And where the *defendant* dies, before the plaintiff could have

<sup>u</sup> 4 T. R. 689.

cited in Cowp. 71. K. B.

<sup>v</sup> Imp. K. B. 152. 1 Sel. Pr. 201.

1 H. Blac. 76. C. P.

<sup>w</sup> 8 Mod. 240.

<sup>x</sup> *Savage v. West*, 9 G. III.

had judgment against him, if there had been no delay in putting in and perfecting bail, the court will stay proceedings on the bail-bond, upon payment of costs only<sup>y</sup>: But they will not relieve the sheriff's bail, upon the death of the defendant, where the plaintiff might have had judgment against him, if bail above had been put in and perfected in time<sup>z</sup>. And the bail cannot avail themselves of the *bankruptcy* of the defendant<sup>a</sup>.

It was formerly holden, that the defendant could not discharge his bail to the sheriff, by *surrendering* himself before the return of the writ; for it was considered as a settled point, that nothing could be a performance of the condition of the bail-bond, but putting in and perfecting bail above<sup>b</sup>. But it has since been determined, that if the defendant surrender himself to the sheriff, before the return of the writ, the bail-bond may be given up to be cancelled, after which, the plaintiff cannot rule the sheriff, or maintain an action against him for not assigning it<sup>c</sup>. And where the defendant is sur-

<sup>y</sup> Cowp. 71. Barnes, 61. *michael v. Chandler*, Imp. K. B. 150.

<sup>z</sup> R. M. 8 Ann. Reg. 1. (c). <sup>b</sup> 5 Bur. 2683. and see Gilb. K. B. 362. Cowp. 71. Dalt. Sher. 356.

Barnes, 112. <sup>c</sup> 6 T. R. 753. 7 T. R.

<sup>a</sup> 1 Bur. 244, 436. Car. 122.

rendered



rendered by his bail, though without justifying, after the time allowed them for justification is expired, the court will stay the proceedings on the bail-bond, on payment of costs<sup>d</sup>.

If the plaintiff be dissatisfied with the bail taken by the sheriff, he should rule him to return the writ<sup>e</sup>. But this rule cannot be had, after the plaintiff has taken an assignment of the bail-bond<sup>f</sup>, if valid; nor where the writ was executed by a *special* bailiff, nominated by the plaintiff or his agent<sup>g</sup>: though, if the bail-bond be void, the sheriff, after an assignment, may be still ruled to return the writ<sup>h</sup>.

The rule to return the writ is a *four* day rule in *London* and *Middlesex*<sup>i</sup>, and a *six* day rule in any other city or county<sup>k</sup>. It is obtained from the clerk of the rules; and usually taken out on

<sup>d</sup> 5 T. R. 401, 534, 633. 1921.

<sup>e</sup> T. R. 297.

<sup>f</sup> Gilb. C. P. 21. R. M. 6 G. II. (a); and see Append. Chap. VII. [A.]

<sup>g</sup> *Ante*, 133, 154.

<sup>h</sup> 2 Blac. Rep. 952. 4 T. R. 119.

<sup>i</sup> 1 Willf. 223.

<sup>k</sup> R. T. 6 G. III. 4 Bur. II. See p. 12.

<sup>\*</sup> R. M. 6 G. II. In the collection of rules and orders, with which Mr. *Abbot* has obliged the profession, beginning in Easter term 1731, and ending in Trinity term 1795, this rule is stated as having been made in *Trinity* term 5 & 6 G.

the return day of the writ by *bill*, or *quarto die post* by *original*, in order that it may keep pace with the time to put in bail: But it cannot regularly be taken out *before*, though dated *on* the return day<sup>1</sup>. And by statute 20 Geo. II. c. 37. § 2. "no sheriff shall be liable to be called upon  
"to make a return of any writ or process, unless  
"he be required so to do, within *six* months after  
"the expiration of his office:" Upon which statute it has been holden, in case of sheriffs, that the months are *lunar* months<sup>m</sup>; that the day of the sheriff's quitting his office is to be reckoned as one<sup>m</sup>; and that the sheriff cannot be ruled to return the writ, after the expiration of six months, though requested *before*<sup>n</sup>.

The rule to return the writ, being intended to bring the sheriff into contempt, must be *personally* served on the sheriff himself, or his under-sheriff; and, except in *London, Middlesex, and Surrey*, service on the under-sheriff's agent in town is not deemed sufficient<sup>o</sup>: For, as six days only are allowed to return the writ, it might otherwise be impossible to obey the rule, in distant counties.

<sup>1</sup> 1 T. R. 552.

<sup>m</sup> Doug. 463.

<sup>n</sup> 2 T. R. 1.

<sup>o</sup> Doug. 420. 3 T. R. 351.

The sheriff, being ruled to return the writ, either does, or does not return it. If there be no return, it is a contempt; for which the court, on a proper *affidavit*<sup>p</sup>, will grant an *attachment*<sup>q</sup>: and this is the constant mode of proceeding against the *late* sheriff<sup>r</sup>, as well as the *present* one; for, as to the former, he ought in strictness to have returned the writ, before he was out of office, and therefore the contempt was actually committed, whilst he was a servant of the court<sup>s</sup>. The writ should regularly be returned by the sheriff, on the day on which the rule for returning it expires; and in default thereof, the plaintiff may move for an attachment on the next day<sup>t</sup>. And in order to ascertain the time of making the return, the *custos brevium* is required to indorse on every writ, on what day, and at what hour, the same was filed<sup>u</sup>.

The sheriff's return to a *capias* is either that the defendant is *not found* in his bailiwick, or that he has *taken* him; and in the latter case, it is either that he has him *ready*, to answer the plaintiff; or, by way of excuse, that he is *sick* or *dead*, (*languidus, vel mortuus est*;) or that he has

<sup>p</sup> Append. Chap. VII. [B.] 496.

<sup>q</sup> R. M. 6 G. II.

<sup>r</sup> R. T. 30 G. III. 3 T. R.

<sup>s</sup> Doug. 464.

787.

<sup>t</sup> R. M. 32 G. III. 4 T. R.

*escaped*, or been *rescued*; or that the sheriff has *discharged* him, or *delivered* him over to another custody, by direction of the plaintiff, or by order of the court". If the sheriff return *non est inventus*, where he has, or might have taken the defendant, he is liable to an action for a false return; and if he return *cepi corpus et paratum habeo*, where he has taken the defendant, and let him go at large, without bail, he is liable to an action, if the defendant be not in custody, or bail above be not put in and perfected, at the return of the writ<sup>v</sup>. But where the sheriff has taken bail, he is not liable to an action, upon the return of *cepi corpus et paratum habeo*<sup>w</sup>; for it was his duty to take bail, and though the latter part of the return be not strictly true, yet this, which was the ancient return, is not altered by the statute 23 Hen. VI. c. 9. Still, however, he may be *amerced* by the court, upon such return, for not bringing in the body, or putting in and perfecting bail above<sup>x</sup>.

If the defendant reside within a *liberty*, the bailiff of which has the execution and return of

<sup>u</sup> Append. Chap. VII. [C.] Saund. 60, 154. 1 Mod. 33.  
<sup>v</sup> Gilb. C. P. 22. Noy, 57, 227. 2 Mod. 83, 177.  
 39. 1 Mod. 228. 2 Mod. 3 Salk. 314, 15. *Ante*, 108, 9.  
 178. S. C. <sup>x</sup> Same cases, and R. M.  
<sup>w</sup> Cro. Eliz. 624, 808, 852. 6 G. II. (a). 1 Will. 262.  
 Noy, 39. S. C. 1 Sid. 22, 1 H. Blac, 233, 4.  
 439. 1 Vent. 55, 85. 2

writs, it is usual for the sheriff to return, that he has made his *mandate* to the bailiff of the liberty, who has given him no answer, or has returned that the defendant is not found in his bailiwick, or that he has taken the defendant, and has him ready<sup>y</sup>. In the first case, the plaintiff is entitled to a *non omittas*, by the statute Westm. 2. c. 39.<sup>z</sup>: In the second, if the return be false, the bailiff is liable to an action; the sheriff not being answerable at common law, for the *false* return of the bailiff<sup>a</sup>: In the last case, the ancient mode of proceeding was by *distingas*<sup>b</sup>; but it seems that the bailiff may now be called upon by *rule*, to bring in the body<sup>c</sup>. If the bailiff make an *insufficient* return, he is liable to be amerced for it, and not the sheriff, by the statute 27 Hen. VIII. c. 24.<sup>d</sup>

Upon the sheriff's return of *cepi corpus et paratum habeo*, if bail above be not put in and perfected, the practice is, for the plaintiff to rule him to bring in the body<sup>e</sup>. And where bail above is put in, and notice thereof given to the plaintiff's attorney, the bail should be *excepted* to, and notice of the exception given to the de-

<sup>y</sup> Off. Brev. 216. Ret. Brev. 168, 9.

<sup>z</sup> Gilb. C. P. 26. 1 Barnard. K. B. 282.

<sup>a</sup> Gilb. C. P. 30.

<sup>b</sup> Id. 31. Brownl. Brev. Jud. 35, &c.

<sup>c</sup> 2 T. R. 5.

<sup>d</sup> Gilb. C. P. 30.

<sup>e</sup> Append. Chap. VII. [D.]



defendant's attorney, before the sheriff is ruled<sup>f</sup>: But where bail above is not put in, at the time of calling upon the sheriff, he must put in and perfect it, at his peril, without an exception<sup>g</sup>.

The rule to bring in the body is a *four* or a *six* day rule<sup>h</sup>, and should be served in like manner as the rule to return the writ. The intent of this rule, where the defendant is not in custody, is to compel the sheriff to put in and perfect bail above<sup>i</sup>: And it cannot in general be taken out, till the day after the expiration of the rule to return the writ<sup>k</sup>; for it is necessary that the proceedings against the sheriff should keep pace with the times allowed for putting in and perfecting bail; otherwise this inconvenience might ensue, that the sheriff might be fixed with the payment of the debt and costs, and upon his bringing an action against the defendant, or his bail, upon the bail-bond, they might plead *comperuit ad diem*. But where the writ, in a *country* cause, was returnable on the *first* of June, and the sheriff was ruled to return it on the *second*, and on the *eighth* he returned *cepi corpus*, upon which the

<sup>f</sup> Lofft, 159. Imp. K. B. 1 Will. 262. 1 H. Blac.

159.

<sup>g</sup> Per Cur. E. 24 G. III.

<sup>233</sup>, 4.

<sup>k</sup> 5 T. R. 479. *Spicer v.*

<sup>h</sup> R. M. 6 G. II. R. T.

*Linnell*, E. 23 G. III, C. P.

<sup>i</sup> 6 G. III. 3 Bur. 1921.

Imp. K. B. 159.

<sup>j</sup> R. M. 6 G. II. (a).

plaintiff,

plaintiff, on the *same* day, served him with a rule to bring in the body, and on the *fifteenth* obtained an attachment, the court held the proceedings to be regular; although it was objected, that the sheriff had all the *eighth* to return the writ, and consequently that the rule to bring in the body should not have been served till the *ninth*: for in this case, the time for putting in bail had expired, before the service of the rule to bring in the body<sup>1</sup>. After the expiration of the rule to return the writ, there should be no delay in ruling the sheriff to bring in the body: for where the sheriff having returned *cepi corpus* to a bailable writ in *Hilary* term, upon which the plaintiff proceeded no further till *Michaelmas* term following, and in the mean time the bail became insolvent, and the defendant absconded; the court thought it unreasonable, that the sheriff should be called upon to bring in the body after such delay, and they set aside an attachment which had issued against him for not doing it<sup>m</sup>.

When the sheriff is called upon to bring in the body, he must either bring it into court, or put in and perfect bail above, within the time allowed him by the rule<sup>n</sup>: Otherwise it is a con-

<sup>1</sup> *Parker and Wall*, M.  
26 G. III.

<sup>n</sup> 1 Willf. 262, R. M. 6 G.  
II. (a).

<sup>m</sup> 7 T. R. 452.

tempt, for which the court will grant an *attachment*, on an *affidavit* of the service of the rule, and that no bail has been put in; or that bail has been put in, but not perfected°. But the contempt is not incurred, till the day is past, on which the rule to bring in the body expires; for the sheriff has the whole of that day to bring it in, and therefore an attachment cannot be moved for till the next day².

It was formerly usual, to proceed against the *late* sheriff, for not bringing in the body by *distringas*³. But now, by rule of court⁴, where any sheriff, before his going out of office, shall arrest any defendant, and a *cepi corpus* shall afterwards be returned, he shall and may, within the time allowed by law, be called upon to bring in the body, by a rule for that purpose, notwithstanding he may be out of office, before such rule shall be granted. The *distringas* against the *late* sheriff was a judicial writ, issuing out of the King's Bench office by *bill*, or filacer's office by *original*, and directed to his successor; commanding him to *distrain* the *late* sheriff, by all his lands, &c. so that he

° Append. Chap. VII. [E.] Doug. 464. Imp. K. B.

p *Rex v. Sheriff of Essex*, 134, 5.

H. 36 G. III.

r R. T. 31 G. III. 4 T. R.

q Trye, 144, 5. 2 Lil. 379.

P. R. 510. 5 Bur. 2726.

might

might have the defendant's body in court to answer the plaintiff'. This writ must have been made returnable on a day *certain*, or *general* return, according to the former proceedings'; and must have lain four days *exclusive* in the sheriff's office; but it need not have been left there *before* the return, it being deemed sufficient to leave it *on* the return day". Upon the first *distringas*, the sheriff to whom it was directed, levied issues to the amount of forty shillings, which the plaintiff moved to increase; and if the debt were small, the court would order the whole of it to be levied, with costs, upon an *alias distringas*: but otherwise the plaintiff moved again to increase the issues, and sued out a *pluries distringas*, &c. and when issues were returned to the amount of the debt and costs, the plaintiff moved for a sale of them, under the statute 10 Geo. III. c. 50. v

The *attachment* is a criminal process, directed to the *coroner*, when it issues against

\* Brownl. *Brev. Jud. Thes.* *distringas* against the *late* sheriff, *Brev. and Off. Brev. tit. Distringas*. And see *Append. Chap. VII. [F.]* is obsolete, in consequence of the rule of T. 31 G. III. before stated; but it may still be used against the *bailiff* of a

\* Trye, 144, 5.

" *Per Cur. H. 23 G. III.*

v 5 Bur. 2726, 7. The mode of proceeding by *dis-*

liberty, for not bringing in the body.

the *present* sheriff; or when against the *late* one, to his successor: And it must be made returnable at a *general* return, though the original process was at a day *certain*<sup>w</sup>. The attachment may be moved for on the *last* day of term<sup>x</sup>; and until it be granted, the proceedings are on the *civil* side of the court, and must be entitled with the names of the parties: But as soon as the attachment is granted, the proceedings are on the *crown* side, and from that time the king is to be named as the prosecutor<sup>y</sup>. If the coroner or sheriff, being called upon by rule, neglect to return the *attachment*, he may be attached himself; and the attachment against the *coroner*, should be directed to *elisors*, named by the master<sup>z</sup>.

When the sheriff is fixed for a contempt, he is liable, in like manner as his bail upon the bail-bond, to the payment of what is really due to the plaintiff, though beyond the sum sworn to and costs, to the full extent of the penalty of the bond<sup>a</sup>: And upon issuing

<sup>w</sup> 1 Str. 624.

<sup>x</sup> 1 Bur. 651.

<sup>y</sup> 3 T. R. 133, 253. 7  
T. R. 439.

<sup>z</sup> Imp. K. B. 137. 1

Cromp. 86.

<sup>a</sup> 7 T. R. 370. 1 H. Blac.  
233, 543. C. P. But see  
Doug.



suing the attachment, he usually pays the amount of the debt and costs, and is reimbursed by his officer, who either puts the bail-bond in suit, if any was taken, in the sheriff's name; or, if no bail-bond was taken, brings an action against the defendant, in his own name, for money paid<sup>b</sup>.

The sheriff cannot be relieved, on the ground of the defendant's *death*, after the contempt was incurred, and before the attachment issued<sup>c</sup>. But the proceedings against him may be superseded, if *irregular*; or if *regular*, may be set aside, by the favor and indulgence of the court, in order to let in a trial of the merits, for the benefit of the sheriff, or of the defendant or his bail. If the plaintiff has not lost a trial, the court will set aside the proceedings, upon putting in and perfecting bail above, and payment of costs<sup>d</sup>: In such case however, if

Doug. 464. where *Buller*, Justice, seemed to consider, that when the sheriff should come to purge the contempt, it would be competent for the court to moderate the punishment, and not impose a fine to the amount of the whole debt; though, in order to proportion it to the actual damages, he thought they must be ascertained by a jury.

<sup>b</sup> But see the case of *Rogers v. Reeves*, 1 T. R. 418. And *quærs* whether according to that case, the sheriff or his officer can maintain an action against the defendant, for money paid, where no bail-bond was taken upon the arrest?

<sup>c</sup> 3 T. R. 133.

<sup>d</sup> 4 T. R. 352.

the application be made on behalf of the defendant, they will require an affidavit of merits; or if made by the sheriff, who cannot be expected to swear to merits, an affidavit is required, that the application originated from him, and was not made in collusion with the defendant in the cause\*. If a trial has been lost, the court will further require, that the attachment shall remain in the office, and stand as a security to the plaintiff, for the sum recovered†. And when the sheriff has been guilty of a breach of duty, in discharging the defendant out of custody, without the plaintiff's assent, upon his *own* undertaking to appear and put in bail, instead of taking a bail bond, the court will not assist him, by staying the proceedings in an action for an escape, or by setting aside the attachment‡.

\* 7 T. R. 239.

T. R. 352.

† *Gravett v. Williams*, T.

‡ 7 T. R. 109, 239.

15 G. III. B. R. cited in 4

## C H A P. VIII.

*Of the Writ of HABEAS CORPUS in Civil Cases ; and the Proceedings thereon.*

HAVING thus far treated of the proceedings in a personal action, when the defendant is *at large*, I shall now consider him as a *prisoner*; and, in the present chapter, shall treat of the writ of *habeas corpus*, as it is used in *civil* cases, to bring the defendant into the custody of the marshal, or, consequentially, to remove causes against him from inferior courts.

The writ of *habeas corpus*, in *civil* cases, is a judicial writ, issuing out of the King's Bench office<sup>a</sup>, commanding the sheriff, or other officer to whom it is directed, to have the body of the defendant, together with the day and cause of taking and detaining him, before the court, or a judge, on a day *certain* in term time, or *immediate*, to *answer* or *satisfy* the plaintiff, or, generally, to *do* and *receive* what the court or judge shall consider of him. Hence it is called, according to the subject-matter, a writ of *habeas corpus ad respondendum*, *ad satisfaciendum*, or *ad*

<sup>a</sup> 2 Bur. 777.*faciendum*

*faciendum et recipiendum*<sup>b</sup>; though the latter is more commonly called a *babeas corpus cum causâ*: And it is grantable of common right, at all times, whether in term or vacation, without any motion in court<sup>c</sup>.

The writ of *babeas corpus cum causâ* lies for the defendant to remove himself, or for the plaintiff to remove him, from the custody of the sheriff, or other officer by whom he was arrested, into the custody of the marshal<sup>d</sup>. At common law, when a defendant was arrested, and detained or charged in custody of the sheriff or other officer, for want of bail, upon mesne process, if the plaintiff did not, within two terms, cause him to be brought up, by writ of *babeas corpus cum causâ*, and committed, so that he might declare against him in the custody of the marshal, the defendant was entitled to his discharge, on common bail or appearance<sup>e</sup>. This mode of proceeding was altered by the statute 4 & 5 W. and M. c. 21. which enables the plaintiff to declare against the defendant in custody of the sheriff, or other officer who arrested him<sup>f</sup>. He is still at liberty, however, to remove the defendant, by writ of *babeas corpus*

<sup>b</sup> Off. Brev. 110, 112.  
<sup>c</sup> Thef. Brev. 131.

<sup>e</sup> R. M. 1654. § 11. R. E.

5 W. & M. Reg. III. § 1. (a).

<sup>c</sup> 1 Lev. 1. 2 Mod. 306.

1 Wils. 120. 2 Bur. 1051.

<sup>d</sup> Append. Chap. VIII.

1 T. R. 192.

[A.]

<sup>f</sup> Vide post, Chap. XI.

*cum causâ*, from the custody of the sheriff or other officer, into the custody of the marshal, at any time before or after judgment<sup>s</sup>.

This writ also lies for the *bail* of the defendant to bring him up, and surrender him in their discharge; and that, whether the defendant is in custody in a *civil* suit, or on a *criminal* account<sup>a</sup>. And under it, the court will either remand the defendant to his former custody, or commit him to the custody of the marshal. Where the defendant is in custody on a *criminal* account, the court will remand him to his former custody<sup>1</sup>. And where an impressed man, not being liable to be taken out of the king's service, by any process, other than for some criminal matter, was brought up by the keeper of the Savoy, to be surrendered in discharge of his bail, the court first committed him to the custody of the marshal, and then ordered him to be delivered *instantly* to the keeper of the Savoy; which was done, and an *exoneretur* entered on the bail-piece<sup>k</sup>. In general, however, the court will commit the defendant, as their prisoner, to the custody of the marshal; and he may be so committed, though he were previously charged in an-

<sup>s</sup> 1 Salk. 354. 2 Str. 1262.      <sup>1</sup> 2 Str. 1217. But see  
Say. Rep. 154. 3 Bur. 1875.      <sup>4</sup> Bur. 2034.  
<sup>h</sup> 7 T. R. 226.      <sup>k</sup> 1 Bur. 339.



other custody, upon an *extent* or *information*, or for a *contempt* in not paying the king's debt; so as the civil action appears to have been commenced before the other proceedings, and the court are satisfied that it is for a just debt, and the application really made by the bail: For, by the 25 Edw. III. c. 19. "the king's debtors shall not be protected from the proceedings of their other creditors against them<sup>1</sup>." The attorney general, however, may have a *habeas corpus* to remand them<sup>m</sup>.

The writ of *habeas corpus cum causâ* should be directed to the sheriff, or other officer, in whose custody the defendant is detained; and there is an old rule<sup>n</sup>, directing it to be made returnable in court, at a day certain in term, unless directed to the sheriffs of London or Middlesex, or unless it be to deliver over the defendant in discharge of his bail. But this rule having fallen into disuse, the writ is now made returnable before the chief-justice at his chambers, *immediatè*; and should be returned in due and convenient time<sup>o</sup>.

When the defendant, being charged with process issuing out of this court, is removed *before* declaration, from the custody of the sheriff or

<sup>1</sup> 1 Salk. 353. 1 Str. 641.

<sup>n</sup> R. M. 1654. § 7.

1 Willf. 248. 1 Bur. 339.

<sup>o</sup> 3 Bur. 1875, 6.

<sup>m</sup> 1 Willf. 248.

marshal,

marshal, to the *Fleet* prison, the plaintiff cannot proceed further here; but must either declare against him in the *common pleas*, or remove him into the custody of the marshal, by writ of *habeas corpus ad respondendum*, in order to charge him with a declaration<sup>p</sup>. This writ also lies for a *third* person, to remove a defendant from the *Fleet*, or prison of an *inferior* court, in order to charge him with a declaration in this court<sup>q</sup>. But then, there must be something to charge him with, either in the body of the *habeas corpus* or return, or ready in court upon bringing him up<sup>r</sup>. The writ of *habeas corpus ad respondendum* should be directed to the *warden* of the *Fleet*, or keeper of an *inferior* prison, returnable at a day certain in court; and will be as good cause of detainer, as a writ of *capias ad respondendum*<sup>s</sup>. But this writ does not lie for the plaintiff in an *inferior* court, to remove the body of the defendant into this court, to answer to a new action here, for the same debt<sup>t</sup>.

When the defendant is removed *after* declaration, from the custody of the sheriff or marshal,

<sup>p</sup> 5 T. R. 36. Barnes, S. C. 1 Salk. 351. 2 Str. 384, 5. 402. and see Append. 936. 2 Bur. 1049.  
 Chap. VIII. [B.] <sup>r</sup> 2 Lil. P. R. 356.  
<sup>q</sup> 3 Bac. Abr. 2. 2 Lil. <sup>s</sup> R. M. 1654. § 7.  
 P. R. 4. Sty. P. R. 330. <sup>t</sup> Cowp. 116.  
 1 Mod. 235. 2 Mod. 198.

to the *Fleet* prison, the plaintiff should proceed to judgment against him in this court, and then remove him into the custody of the marshal, by writ of *habeas corpus ad satisfaciendum*, in order to charge him in execution". This writ should be directed and returnable, in the same manner as the writ of *habeas corpus ad respondendum*; and the number of the judgment-roll indorsed thereon, by the attorney who sues it out v.

Under one or other of these writs, a defendant may cause himself to be removed, from any *civil* custody, into that of the marshal. If he be already in custody of the *sheriff*, under the process of this court, he has only to sue out a writ of *habeas corpus cum causa*; under which he will be removed, as a matter of course, on paying the usual fees: and he may be removed, in like manner, from the prison of an *inferior* court. But if he be in custody of the *sheriff*, under the process of the *common pleas* or *exchequer*, he must procure aailable writ to be taken out against him in this court, and lodged in the sheriff's office, as a foundation for his commitment on the *habeas corpus*. Where he is in custody of the *warden* of the

<sup>u</sup> 1 Sid. 100. R. T. 2 Chap. VIII. [C.]  
Geo. I. (b). 2 Str. 1153. <sup>v</sup> R. M. 1654. § 7. R. T.  
Barnes, 385. and see Append. 2 Geo. I. (b).

*Fleet*, he may be removed, in *term* time, by writ of *habeas corpus ad respondendum*; upon which he must be charged in court, with a declaration in aailable action: in *vacation*, aailable writ must be taken out against him, and bail above put in thereon, in this court; and then a writ of *habeas corpus cum causa* must be brought, in order to surrender him in discharge of his bail. A prisoner removed into the custody of the marshal, by writ of *habeas corpus ad respondendum*, cannot be removed elsewhere, till he has answered to the cause here<sup>v</sup>. And it is a general rule, applicable to all writs of *habeas corpus*, that "every  
 "prisoner, who, by virtue thereof, shall be  
 "committed to the custody of the marshal,  
 "shall remain there for *two* days next after  
 "such commitment, notwithstanding any other  
 "writ of *habeas corpus* to the said marshal  
 "delivered and allowed<sup>x</sup>."

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When a defendant, against whom there is a cause depending in an *inferior* court, is removed by *habeas corpus* into the court of King's Bench, the inferior court have lost their jurisdiction over him; and not having jurisdiction over his person, they cannot proceed in

<sup>v</sup> 1 Salk. 350.

<sup>x</sup> R. H. 5 W. & M.

the cause, the bail in the inferior court are discharged, and the plaintiff must declare *de novo*<sup>1</sup>. Hence, the writ of *habeas corpus* is the common method of removing causes from inferior courts<sup>2</sup>.

It was formerly usual for the defendant in an inferior court to sue out a writ of *habeas corpus*, and keep it in his pocket, without producing it, till issue was joined, the jury sworn, and the plaintiff had given his evidence; by which means the plaintiff was not only put to a considerable expence, but the defendant, knowing beforehand what proofs he could produce, had an opportunity of opposing them by false witnesses<sup>3</sup>. To remedy this mischief, it was enacted, by the statute 43 Eliz. c. 5. that "no writ of *habeas corpus*, or other writ, to remove any cause depending in an inferior court, having jurisdiction thereof, shall be received or allowed by the judges or officers of such court, but they may proceed therein, as if no such writ were sued forth or delivered, except the said writ be delivered to such judges or officers, before the jury have appeared, and one of them is sworn." And, still further to avoid vexatious delays, by the removal of causes out of inferior courts, it

<sup>1</sup> Skin. 244, 5.

<sup>2</sup> 3 Bac. Abr. 15.

<sup>3</sup> See the preamble to the statute 43 Eliz. c. 5.

was



was enacted, by the statute 21 Jac. I. c. 23. § 2. that “no writ of *babeas corpus, certiorari*, “or other writ, except writs of error or attain, “to stay or remove any cause, depending in an “inferior court of record, having jurisdiction “thereof, where the same arises within its jurisdiction, shall be received or allowed by the “judges or officers of such court, but they “may proceed therein, &c. except the said “writ be delivered to such judges or officers, “before *issue* or *demurrer* joined in the said “cause; so as the same be not joined within “six weeks next after the arrest or appearance “of the defendant.” This statute is confined to inferior courts of record, and does not extend to the case of an interlocutory judgment: Therefore the practice, in that case, is to allow the *babeas corpus*, in like manner as upon the 43 Eliz. provided it be delivered at any time before the jury are sworn<sup>b</sup>; which is also the practice, where issue is joined within six weeks next after the defendant’s arrest or appearance.

By the lastmentioned statute, it is further provided, that “if in any cause, not concerning freehold or inheritance, or title of land,

<sup>b</sup> 2 Bur. 759, 1152. But see Pr. Reg. 217. Barnes, 221. S. C. *contra*.

“ lease or rent, commenced or depending in  
 “ any such inferior court of record, it shall  
 “ appear, or be laid in the declaration, that  
 “ the debt, damages, or things demanded, do  
 “ not amount to the sum of *five* pounds, then  
 “ such cause shall not be stayed or removed, by  
 “ any writ or writs whatsoever, other than writs  
 “ of error or attain<sup>c</sup>.” Soon after the making  
 of this statute, a method was contrived, of re-  
 moving causes for *less* than five pounds, by set-  
 ting up an action for a fictitious demand, of  
 five pounds or upwards; and then, upon suing  
 out a *habeas corpus*, all the causes were removed  
 together<sup>d</sup>. To defeat this contrivance, it was  
 enacted, by a subsequent statute\*, that “ the  
 “ judges of such inferior courts, as are described  
 “ in the statute of *James*, may proceed in such  
 “ causes as are therein specified, which appear  
 “ or are laid not to exceed the sum of *five*  
 “ pounds, although there may be other actions  
 “ against the defendant, wherein the plaintiff’s  
 “ demands may exceed the sum of five pounds.”  
 And lastly, by the statute 19 Geo. III. c. 70.  
 § 6. which takes away the arrest under ten  
 pounds in inferior courts, it is provided, that

<sup>c</sup> 21 Jac. I. c. 23. § 4.

\* 12 Geo. I. c. 29. § 3.

<sup>d</sup> Palm. 403.

“no cause, where the cause of action shall not  
 “amount to the sum of ten pounds or upwards,  
 “shall be removed or removeable into any su-  
 “perior court, by any writ of *habeas corpus* or  
 “otherwise, unless the defendant shall enter  
 “into a recognizance to the plaintiff, in the  
 “inferior court, with two sufficient sureties, in  
 “double the sum due, for the payment of the  
 “debt and costs, in case judgment shall pass  
 “against him.”

The writ of *habeas corpus*, we are now speak-  
 ing of, when directed to the inferior courts of  
 London, Westminster, Southwark, and other  
 courts within five miles of London, may be re-  
 turnable *immediate*; but otherwise it must be re-  
 turnable on a day certain, in court<sup>f</sup>. And if it  
 be duly and regularly issued, and delivered to the  
 judges of an inferior court, it instantly suspends  
 their power; insomuch that if they afterwards  
 proceed, they are liable to an attachment, and  
 their proceedings are void and *coram non judice*<sup>g</sup>.  
 In such case, therefore, the writ should be forth-  
 with received and allowed: Nor can the officer  
 refuse to obey it, under pretence of not being  
 paid his *fees* in the court below, or the *charges* of

<sup>f</sup> R. M. 1654. § 8.

85. Skin. 244. 1 Salk. 148.

<sup>g</sup> Cro. Car. 261. 1 Mod.

352. 6 Mod. 177. S. C.

195. T. Jon. 209. 3 Mod.

bringing up the defendant<sup>h</sup>: For the former, he has a proper remedy by action; and for the latter, if not paid, the defendant may be remanded<sup>i</sup>.

If the writ of *habeas corpus* be delivered after issue or demurrer joined<sup>k</sup>, unless it be joined in six weeks after the defendant's arrest or appearance, or in a cause for less than *five* pounds, or if the damages be under *ten* pounds, and no recognizance entered into pursuant to the 19 Geo. III. c. 70.<sup>l</sup>, "the judges of the inferior court may disallow and refuse the same; and proceed as if no such writ had been granted or sued forth: provided there be an utter-barrister, of three years standing, at the bar of one of the four inns of court, steward or under-steward, town-clerk, judge, or recorder of such inferior court, or assistant to the judge or judges of the same, who is not an utter-barrister of that standing, there present, and not of counsel in any action or suit there depending<sup>m</sup>." If this proviso be not complied with, the cause may be removed at any time<sup>n</sup>: and the court will not grant a *procedendo*, where the

<sup>h</sup> 2 Str. 814. 2 Bur. 1152.

<sup>m</sup> 21 Jac. I. c. 23. § 6.

<sup>i</sup> 1 Str. 308. 2 Str. 1262.

<sup>n</sup> Cro. Car. 79. 3 Mod.

<sup>k</sup> 21 Jac. I. c. 23. § 5.

85.

<sup>l</sup> § 6. 2 Crompt. 419, 20.

judge is a barrister, if he be not present at the trial<sup>o</sup>.

When the writ is received and *allowed*, the body of the defendant must be returned, with the causes of taking and detaining him; or the officer will be liable to an *attachment*. And it is not sufficient to return, that before the coming of the writ, the party was bailed; for he is still in custody, in contemplation of law<sup>p</sup>. And even where the writ is *disallowed*, for any of the causes beforementioned, it must be returned to the court, with the *special matter*<sup>q</sup>.

On the return of the writ, if the defendant be in actual custody, on *mesne* process, the court will not discharge him, till bail be put in and perfected *above*<sup>r</sup>: And therefore, in such case, the better way of gaining the defendant his liberty, is to put in and perfect bail *below*, before the bringing of the *habeas corpus*<sup>s</sup>. If it be returned, upon the *habeas corpus*, that the defendant is condemned by judgment, he shall be remanded, and continue in prison, without being let to bail, against the will of the plaintiffs; until agreement be made with them of the sums

<sup>o</sup> 1 Bur. 514.

<sup>p</sup> *Salmon v. Slade*, H. 25,

26 Car. II. 2 Crompt. 419.

<sup>q</sup> 1 Mod. 195. 3 Mod.

85. Carth. 59. 2 Crompt.

419, 20.

<sup>r</sup> R. M. 1654. § 7. R. H.

<sup>s</sup> Jac. II. (a).

<sup>t</sup> New-Guide, K. B. 244.

adjudged,



adjudged'. In the latter case, therefore, if the defendant mean to be turned over to the King's Bench prison, it is usual for him to have a friendly action brought against him in the court *below*; which being returned, will be a cause of detainer in the court *above*.

When the defendant is not in actual custody, upon the return of the *habeas corpus*, he must put in bail, if called upon, in the court *above*; which bail is either *common* or *special*, as in the court *below*. Before the statute 12 Geo. I. c. 29. every defendant, not being an executor or administrator, must have put in special bail upon a *habeas corpus*, in all actions whatsoever, except actions for words and trifling assaults, unless a judge had otherwise ordered". By that statute, "no person shall be holden to *special* bail, upon "process issuing out of an inferior court, where "the cause of action shall not amount to the sum "of *forty shillings* or upwards." And it has been since declared, by a subsequent statute\*, that "no person shall be arrested, or holden to " *special* bail, upon such process, where the cause "of action shall not amount to the sum of *ten pounds* or upwards." Therefore, at this day,

\* Stat. 2 Hen. V. stat. 1.      " R. M. 1654. § 9. R. H.  
c. 2. Year-book, 9 Hen. VI.    2 Jac. II.  
8.                                      " 19 Geo. III. c. 70.

unless

unless there be a cause of action to that amount, the defendant need not put in *special* bail, upon a *habeas corpus*, in the court *above*: though if it be under that amount, he must enter into a recognizance, with two sureties, to the plaintiff, in the court *below*.

At the return of the writ, the plaintiff may have a rule for a *procedendo*, unless the defendant put in bail, within *four* days after notice of the rule, if in *term*; if in *vacation*, then a rule or warrant for a *procedendo*, unless good bail be put in, within *six* days after notice thereof\*. But the defendant cannot put in bail *before* the return of the writ†: and even afterwards, he is not obliged to do so, unless called upon by rule‡.

The bail upon a *habeas corpus* are taken on a *bail-piece*, setting forth that the defendant is delivered to bail upon a *habeas corpus*, at the suit of the plaintiff or plaintiffs *in the plaint*§; in which respect, it differs from the bail-piece upon a *cepi corpus*. The bail-piece is usually annexed to the *habeas corpus* and return; it being a rule¶, that “no bail shall be taken upon a *habeas cor-*

\* R. H. 10 W. III. (a).

† R. T. 8 W. III. Reg. 3.

‡ R. M. 1651. R. E. § 1. and see Append. Chap. 29 Car. II. R. H. 10 W. III. VIII. [D.]

§ New-Guide, K. B. 242.

¶ R. H. 10 W. III.

But see R. M. 1654. § 8.

“ *pus,*

“*pus*, by any justice of this court, unless the  
 “ writ, with the return thereof, shall be offered  
 “ before the said justice to be filed, at the time  
 “ of putting it in.” Where *common* bail are suf-  
 ficient, the bail-piece should be filled up, an-  
 nexed to the *habeas corpus* and return, and filed,  
 by the defendant’s attorney, at a judge’s cham-  
 bers, within the time allowed by the rule<sup>b</sup>.  
 Where *special* bail are required, they may be put  
 in, at any time pending the rule, before a judge  
 in town, commissioner in the country, or judge  
 of assize in his circuit<sup>c</sup>: and they are either *ab-*  
*solute* or *de bene esse*, as upon a *cepi corpus*<sup>d</sup>.

The bail in such case are liable to all the ac-  
 tions mentioned in the return of the *habeas cor-*  
*pus*, wherein the plaintiff or plaintiffs shall declare  
 within two terms<sup>e</sup>. But this must be understood  
 of the bail upon a *habeas corpus*, before declara-  
 tion: for it is said, that if the plaintiff have de-  
 clared, before the *habeas corpus* delivered, in  
 one action which requires *special* bail, and in an-  
 other wherein *common* bail is sufficient, the bail  
 shall be *special*, only as to that action which re-  
 quires special bail, and *common* to the other<sup>f</sup>.

<sup>b</sup> New-Guide, K. B. 250, *Ante*, 132.

251.

<sup>c</sup> R. T. 8 W. III. Reg. 3.

<sup>e</sup> R. H. 2 Jac. II. (a).

§ 1.

<sup>d</sup> R. M. 1654. § 7, 8.

<sup>f</sup> *Serle v. Newton*, H. 25,  
 26 Car. II. 2 Crompt. 428.

But

But special bail are liable on a removal *after* declaration, though the plaintiff declare in a *different* kind of action, in the court above, so as it be for the *same* cause<sup>e</sup>.

When special bail are put in, upon a *habeas corpus*, notice thereof should be given in writing, before the expiration of the rule, to the plaintiff's attorney<sup>h</sup>; who is allowed *twenty-eight* days after they are put in, to except to them: and if he do not except to them for insufficiency, within that time, the bail-piece should be filed, by the defendant's attorney, within *four* days next after the end of the twenty-eight days<sup>i</sup>. If the bail in an inferior court offer to become bail in the action here, the plaintiff is, in general, compellable to take them; because he might, but did not except to them below: But it is otherwise, where a cause comes hither out of *London*; for the sufficiency of the bail *there* is at the peril of the clerk, and he is responsible to the plaintiff; so that the plaintiff had not the liberty of excepting to them; and the clerk is not responsible, if they be deficient, in this court, though he was in *London*<sup>k</sup>.

If the plaintiff except against the bail, he may have a rule or warrant for a *procedendo*, unless

<sup>e</sup> 1 Will. 277.

16 Car. II. and note (b).

<sup>h</sup> Append. Chap. VIII. 1 Salk. 98.

[E.]

<sup>k</sup> 1 Salk. 97.

<sup>i</sup> R. M. 1654. § 8. R. M.

they are perfected in *four* days, after service of the rule<sup>1</sup>: and thereupon the *same* or *different* bail must justify, (as in other cases,) within the four days, if the rule be served in *term*; but if served in *vacation*, it is sufficient for the defendant to give notice, within the time allowed by the rule, of an intended justification, on the first day of the ensuing term<sup>m</sup>.

If bail be not put in and perfected in due time, a *procedendo* may be awarded<sup>n</sup>; which is a writ, directed to the judge of the inferior court, commanding him to proceed in the cause<sup>o</sup>. The *procedendo* removes the suspension created by the *habeas corpus*; and a cause, once remanded thereby, cannot afterwards be removed or stayed before judgment<sup>p</sup>. This writ may also be awarded, where it appears upon the return of the *habeas corpus*, that the court *above* cannot administer the same justice to the parties as the court *below*: As where an action is brought in *London*, for calling a woman *whore*<sup>q</sup>; or upon a custom or bye-law, which is only sueable there<sup>r</sup>. So where a cause was removed from

<sup>1</sup> R. M. 16 Car. II. (c).      <sup>p</sup> Stat. 21 Jac. I. c. 23.

<sup>m</sup> New-Guide, K. B. 249; § 3.

and see Append. Chap. VIII.      <sup>q</sup> 2 Rol. Abr. 69. Carth.

[F.]

75.

<sup>n</sup> R. M. 1654. § 8.

<sup>r</sup> 2 Bur. 777, 8. 2 Blac.

<sup>o</sup> Append. Chap. VIII. Rep. 1060.

[G.]



the mayor's court of London, by an *habeas corpus cum causa*, to which a return was made, stating a custom under which the defendant was sued and arrested, and error was suggested on the face of the proceedings below, this court would not stay the *procedendo* merely on that ground, but said they would leave the defendant to his writ of error\*. But, except in causes removed from *London*, the court will not enter into the validity of a bye-law, in a summary way, on the return of the *habeas corpus*; but put the parties to declare upon it, and demur†. If, after a *procedendo* to carry back a cause to an inferior court, the plaintiff recover, and then sue out a *scire facias* against the bail below, and they remove the proceedings against them into this court by *habeas corpus*, this court will award a *procedendo* in the suit against the bail‡.

Where a *habeas corpus* is brought, after interlocutory and before final judgment, in an inferior court, and the defendant dies before the return of it, a *procedendo* shall be awarded: because, by the 8 & 9 W. 3. c. 11. the plaintiff may have a *scire facias* against the executors, and proceed to judgment, which he cannot have

\* 6 T. R. 760.

† 6 T. R. 365.

‡ 2 Bur. 775.

in another court; and by this means he would be deprived of the effect of his judgment, which would be unreasonable<sup>v</sup>. So where an action was brought in the sheriff's court of *London* against two partners, and one of them brought a *habeas corpus*, and put in bail for himself only, a *procedendo* was granted: for otherwise the plaintiff would have been disabled from going on, in either court<sup>w</sup>.

The record itself is never removed by a *habeas corpus*, as it is on a *certiorari*, but remains below; and the return is only an account or history of their proceedings, stated and sent up to the superior court, to judge and determine the matter there: therefore if a cause be removed hither, by *habeas corpus*, the plaintiff here must begin *de novo*, and declare against the defendant as in custody of the marshal<sup>x</sup>.

Upon a *habeas corpus*, the plaintiff must declare, if at all, before the end of the *second term* after putting in bail, including the term in which it was put in<sup>y</sup>. If he do not declare within that time, the defendant's attorney is not

<sup>v</sup> 1 Salk. 352.

<sup>w</sup> 1 Str. 527.

<sup>x</sup> 1 Salk. 352. and see Skin. 245. 6 Mod. 177. 1 T. R. 372.

<sup>y</sup> 1 Str. 631. Barnes, 90. 752.

But see Cro. Jac. 620. by which it appears, that anciently the plaintiff had *three* terms to declare after bail put in. And see 6 T. R.

bound

bound to accept a declaration"; though the plaintiff cannot be *nonpros'd* for want of it". Upon a *recordari facias loquelam*, however, by which both parties have a day in court, if the plaintiff do not appear, the defendant may sign a judgment of *nonpros*, and is entitled to costs".

\* R. M. 16 Car. II. (c). \* 1 T. R. 371.

Cowp. 117. 1 T. R. 372.

## CHAP. IX.

*Of the BILL against PRISONERS, in the actual or supposed Custody of the MARSHAL; and how far it is considered as the Commencement of the Suit.*

**W**HEN a defendant is committed to the custody of the marshal<sup>a</sup>, or has put in bail upon a *cepi corpus*<sup>b</sup>, or *habeas corpus*<sup>c</sup>, the plaintiff, or any other person, may exhibit a bill, and declare against him, as a prisoner of the court, in whatever action, and charge him with whatever injury he thinks proper<sup>d</sup>.

Where the defendant is in *actual* custody, he has the privilege of the court, and cannot be compelled to answer elsewhere; therefore if he were not to answer here, none could have remedy against him<sup>e</sup>. And even where he is not in actual custody, yet still, when he appears and puts in bail, he is *supposed* to be in custody

<sup>a</sup> 7 Hen. VI. 42. 27 Hen. VI. 6. a. 2 Inst. 23. 4 Inst. 352.

72. 2 Bulst. 207, 8.

<sup>b</sup> 31 Hen. VI. 10. 32 Hen. VI. 4.

21 Hen. VII. 33.

Hob. 264, 5. Cro. Jac. 450.

Godb. 339. Cro. Car. 330.

<sup>c</sup> Cro. Jac. 620. 1 Salk.

<sup>d</sup> R. E. 15 G. II. Cwp.

455.

<sup>e</sup> 2 Bulst. 123. Carth. 378.

1 Salk. 1, 2. S. C. 2 Bar.

1051. 1 T. R. 592.

of the marshal, and may be proceeded against accordingly. But an appearance alone, without bail, is not sufficient<sup>f</sup>; it being clearly settled, that where the defendant is not in actual custody, no action can be legally commenced against him as a prisoner, until he has filed bail<sup>g</sup>. It is the entry of bail in such case which gives this court jurisdiction<sup>h</sup>: and therefore where no bail is entered for the defendant<sup>i</sup>, or where bail is entered for him by a wrong name<sup>k</sup>, or there are several defendants, and no bail is entered for one of them<sup>l</sup>, the proceedings are void, and *coram non judice*. But it is said, that by the practice of this court, though the defendant's bail be not taken and entered till the last day of term, and the bill be put in before, any time that term, it is well enough; yet, from the time of the bail, the defendant is answerable as in custody of the marshal, and not before, in strictness of law<sup>m</sup>.

The *bill* against a prisoner is a complaint in writing, and, except where the action is brought

<sup>f</sup> 7 Hen. VI. 41. Cro. Eliz. 605.

<sup>i</sup> Cro. Eliz. 605. Moor, 694. Cro. Jac. 620.

<sup>g</sup> 1 Sid. 373. 2 Keb. 368.

<sup>k</sup> Cro. Eliz. 223.

S. C. 1 Vent. 135. 2 Lev.

<sup>l</sup> Poph. 145.

13. 2 Keb. 790. S. C.

<sup>m</sup> Hob. 70. Cro. Jac.

<sup>h</sup> 1 Vent. 135.

384. Jenk. 295. S. C.



for a *trespass* committed in *Middlesex*<sup>a</sup>, should alledge the defendant to be in custody of the marshal. Where the defendant is in actual custody, the bill should be filed, on treble-penny stamped parchment, with the clerk of the declarations, in the King's Bench office, before a copy of it is delivered to the defendant, or left for him with the gaoler or turnkey<sup>b</sup>. But a declaration against a defendant at large upon *bail* is good, although a bill has not been filed; because, if the bringing of a writ of error, or any other reason, make the filing of a bill necessary, it may be filed at any time<sup>c</sup>.

Where the defendant is in the actual or supposed custody of the marshal, upon a bill of *Middlesex* or *latitat*, &c. the bill, exhibited against him as a prisoner of the court, is considered as the commencement of the suit, and the bill of *Middlesex* or *latitat*, &c. merely as process to bring him into court<sup>d</sup>. Such process, therefore, may be sued out, though the defendant ought not to be arrested upon it, before the cause of action<sup>e</sup>; and the plaintiff is

<sup>a</sup> Dyer, 118. (a).

<sup>b</sup> R. E. 5 W. & M.

Reg. 3. § 1. (b). 8 Mod. 226, 7.

<sup>c</sup> Say. Rep. 49.

<sup>d</sup> 1 Wils. 40, 144, &c.

2 Bur. 960. But see 3 Bur.

1244.

<sup>e</sup> Cro. Eliz. 271. Cro. Jac.

561. 1 Vent. 28. 8 Mod.

343. 1 Wils. 142. 2 Bur.

967. Doug. 62.

allowed

allowed to give in evidence a cause of action, arising after it is sued out, and before the exhibiting of the bill, as well in the case of *bailable*, as common writs\*. It has been frequently ruled, however, that for certain purposes, a bill of *Middlesex* or *latitat*, out of this court, may be taken to be in nature of an original writ, in the *Common Pleas*†; and a *latitat*, even without a bill of *Middlesex*, if properly issued, and continued on the roll, has been holden to be a good commencement of the suit, to avoid a plea of the statute of limitations‡, or a *tender* made after suing it out§. It was indeed said by *Holt*, Ch. J. that "there is a difference between a civil action, and an action given by a statute; for in the first case, the suing out a *latitat* within the time, and continuing it afterwards, will be sufficient; but in the other case, if the party proceed by bill, he ought to file his bill within time, that it may appear to be upon the record itself¶." But upon a writ of error, all the judges in the ex-

\* Cowp. 454. 7 T. R. 4. Raym. 1441. S. C. 2 Bar.

† Cowp. 456. 961.

‡ Sty. Rep. 156, 178. § Cro. Car. 264. 1 Will.

1 Sid. 53, 60. Carth. 133. 141.

2 Ld. Raym. 880. 1 Str. ¶ Carth. 233.

550. 2 Str. 736. 2 Ld.

chequer-chamber held, that a *latitat* is a kind of original in the King's Bench<sup>a</sup>. And accordingly, in two subsequent cases<sup>c</sup>, it was holden to be a good commencement of the suit in a penal action. Hence it appears, that a *latitat* may be considered, either as the commencement of the action, or only as process to bring the defendant into court, at the election of the plaintiff<sup>a</sup>: Though if it be stated as the commencement of the action, to avoid a *tender*, the defendant may deny that the plaintiff had any cause of action at the time of suing it out<sup>a</sup>; or if it be replied to a plea of the statute of limitations, the defendant, in order to maintain his plea, may aver the real time of suing it out, in opposition to the *teste*<sup>b</sup>.

Where the proceedings are entered with a general *memorandum*, which relates to the first day of term, and the cause of action appears, in evidence, to have arisen after the first day of term, but before the suing out of the writ, the plaintiff may produce the writ, in order to shew, that it was really sued out, subsequent to

<sup>a</sup> 2 Ld. Raym. 883.

<sup>z</sup> Bul. Ni. Pri. 151. c. 1

<sup>y</sup> *Bridges v. Knapton*, &  
*Hardiman v. Whitaker*, cited  
in 2 Bur. 950. 3 Bur. 1243.  
Cowp. 454.

Willf. 146.

<sup>a</sup> 1 Willf. 141.

<sup>b</sup> 2 Bur. 950.

the cause of action\*. And where, in a similar case, the fact complained of was admitted by the defendant's plea of *son assault demesne*, the court held it to be well enough; for the plaintiff need not give any evidence on this plea, unless to aggravate damages: and the court will not nonsuit him, because it is amendable by a new bill<sup>d</sup>. In like manner, where the defendant pleads *plene administravit*, or a *tender*<sup>e</sup>, he has a right to set up the fact against the fictitious relation, in order to support his plea.

After verdict, a general *memorandum*, by which the cause of action appears to have arisen after the action brought, has been allowed to be rectified by an examination of the real time of filing the *bill*<sup>f</sup>, or of the *bail*<sup>h</sup>, to which the bill relates; but the better and more usual way is to file a *new* bill, and amend by it<sup>i</sup>.

\* 1 Blac. Rep. 312. 3 Bur. 2 Keb. 790. S. C. and see 1241. S. C. Carth. 114. 1 Show. 147.

<sup>d</sup> 2 Str. 1271. 1 Willf. 171. S. C.

<sup>e</sup> 1 Sid. 432.

<sup>f</sup> Cowp. 456.

<sup>g</sup> 1 Sid. 373. 2 Keb. 368.

S. C. 1 Vent. 135. 2 Lev. 13.

<sup>h</sup> 1 Sid. 432. 2 Lev. 176.

T. Jon. 87. 3 Keb. 693.

S. C. But see Carth. 113.

<sup>i</sup> 1 Str. 583. 2 Str. 1151.

1162. 1 Willf. 104.

## C H A P. X.

*Of the PROCEEDINGS against PRISONERS  
in the actual Custody of the MARSHAL,  
previous to the Plea.*

A PRISONER, in the actual custody of the marshal, may be proceeded against by the *same* plaintiff, at whose suit he was arrested, or *charged* in custody by a *third* person. And the *same* plaintiff may proceed against him, either for the cause of action expressed in the process, or for a *different* cause of action.

If a prisoner be turned over from one custody to another, it is always considered as a *continuance* of the same imprisonment<sup>a</sup>. Therefore, where a defendant, having been taken or charged in custody of the sheriff, or other officer, by mesne process, is afterwards removed by *habeas corpus*, and committed to the custody of the marshal, the proceedings against him are to be reckoned, from the time of his having been so taken or charged in custody<sup>b</sup>. With this excep-

<sup>a</sup> 1 Bur. 439.    <sup>b</sup> T. R. 5    R. H. 26 G. III.  
36. 6 T. R. 524.

tion,



tion, it is a general rule, that where the defendant is committed to the custody of the marshal, upon a *babeas*<sup>c</sup>, or *cepi corpus*<sup>d</sup>, &c. before declaration, the plaintiff should declare against him, before the end of the term next after such commitment: or, in case of a surrender to the marshal in discharge of bail, before the end of the term next after such surrender, and due notice thereof<sup>e</sup>. But the term of the commitment or surrender is to be accounted one, although the defendant was not committed or surrendered till the last day of vacation<sup>f</sup>.

The mode of proceeding by the *same* plaintiff, against a prisoner in custody of the marshal, upon process in *trespass*, or by *attachment* of privilege<sup>g</sup>, is by filing a *bill* against him, as a prisoner of the court, with the clerk of the declarations in the King's Bench office; and delivering a copy of it, on treble-penny stamped paper, to the defendant, or *turnkey* at the King's Bench prison. But the delivery of a *declaration* is sufficient, without a *bill*, where the prisoner is in custody upon process by *original*. By the practice of this court, no declaration can

<sup>c</sup> R. M. 16 Car. II. (b). and note (a). 8 Mod. 306.  
6 Mod. 21.

<sup>e</sup> R. H. 26 Geo. III. and

<sup>d</sup> R. M. 1654. § 11. R. B. see R. T. 1 Ann. Reg. 2.

<sup>5</sup> W. & M. Reg. 3. § 1. (a). <sup>f</sup> R. T. 2 Geo. I. (a).

<sup>6</sup> Mod. 254. R. T. 2 Geo. I. <sup>g</sup> Cro. Car. 330.

be delivered against a prisoner, in custody of the marshal, at the suit of the *same* plaintiff, except in term<sup>a</sup>. And formerly, the defendant was brought into court, by *rule*, in order to be charged with a declaration; there being no occasion for a *habeas corpus*, where it was in the *same* court<sup>1</sup>. But now, this practice is disused: and there is no occasion for an *affidavit* of the delivery of the declaration, where the defendant is in custody of the marshal<sup>k</sup>.

The time and manner of proceeding against a prisoner, by the *same* plaintiff for a *different* cause of action, are the *same* as by a *third* person. But neither the plaintiff nor a third person can charge him with a *civil* action, when he is in custody of the marshal, or in any other custody, on a *criminal* account, without leave of the court<sup>l</sup>, or a judge<sup>m</sup>. And a prisoner in custody on an *attachment*, for a contempt, is holden to be a prisoner in custody on a *criminal* account, within the meaning of this rule<sup>n</sup>. But a person

<sup>a</sup> 2 Bur. 1051, 2.

<sup>1</sup> Salk. 354. R. T. 2 Geo. I.

<sup>1</sup> *Id.* 2 Lil. P. R. 357.

(a).

<sup>k</sup> R. E. 5 W. & M. Reg. 3.

<sup>m</sup> Imp. K. B. 518.

§ 2. (a).

<sup>n</sup> Pr. Reg. 325. but see

<sup>1</sup> T. Raym. 58. 1 Sid. 90. Pr. Reg. 326, 7. Barnes, S. C. 1 Lev. 124. 1 Sid. 380. 2 Blac. Rep. 970. as 154. S. C. 1 Lev. 146. to fugitives, &c.

in custody under an attachment, for non-payment of costs, may be charged with an execution, in a different action, as a matter of course<sup>o</sup>. And one who is attainted of felony, or even treason, may be charged with a civil action by leave of the court, or a judge; so as it be not to defeat the effect of the king's pardon, by disabling him from going abroad<sup>p</sup>.

A prisoner once committed to the custody of the marshal, is liable to be charged with a civil action, either by the *same* plaintiff or a *third* person, as long as he remains in actual custody. For though it be a rule, that a prisoner once supersedeable is always so, yet this holds only with regard to the *same* plaintiff, at whose suit he was supersedeable<sup>q</sup>; and even with regard to him, it must be understood with this qualification, that the prisoner is only supersedeable, so long as he remains in the *same* custody, and under the *same* process; for the moment the nature of the custody is changed, the rule ceases. Therefore if a prisoner, on mesne process, be supersedeable for any irregularity, as for want of the demand of a plea, he cannot take advantage of it, *after*

<sup>o</sup> 4 T. R. 316.

S. C. Caf. temp. Hardw, 190.

<sup>p</sup> 2 Salk. 500. 7 Mod.

1 Blac. Rep. 30. 1 Will.

153. 2 Ld. Raym. 848.

217. Fost. 61. S. C.

S. C. Id. 1572. 2 Str. 873.

<sup>q</sup> 2 Bur. 1048.

he

he is charged in execution; supposing he has any opportunity of applying on that ground, *before* he is charged in execution'. And it has been holden, that a creditor may lawfully enter a detainer against his debtor, who is in fact resident within the walls of the prison, though he be not there by compulsion'.

The mode of charging a prisoner with an action, in custody of the marshal, in *term* time, is by filing a bill against him, as being in such custody, and delivering a declaration, which is a mere copy of the bill, to the turnkey. In *vacation*, there was formerly no way to charge him, but by making an entry in the marshal's book, in the King's Bench office, that he should remain in custody, at the suit of the intended plaintiff, which was deemed sufficient to charge him, provided he were then in actual custody; for if he were at liberty, he might have been arrested'. But in a modern case<sup>a</sup>, where this matter was fully discussed, the court of King's Bench were of opinion, that the right method of charging the defendant with a new suit, in *vacation*, is to file a bill as of the preceding term; and then to

<sup>r</sup> 1 T. R. 591.

and see Append. Chap. X.  
XI. [A.]

<sup>s</sup> 3 T. R. 392.

<sup>t</sup> 6 Mod. 254. 1 Salk.

<sup>u</sup> 2 Bur. 1052.

213, 14. 345. 3 Salk. 150.

deliver

deliver to, or leave for the defendant, being in custody, a copy of the declaration, as of the preceding term, and to make an affidavit thereof. And where the defendant is charged in *vacation*, upon a cause of action arising after the last term, there should be a special *memorandum*, similar to that against an *attorney* under the like circumstances, stating the day of bringing the bill into the office of the clerk of the declarations. For preventing, however, the detainer of prisoners, charged by declarations, in the custody of the marshal, where the cause of action against them does not amount to *ten* pounds, it is a rule, "that no declaration shall be sufficient cause of detaining such prisoner in custody, unless an affidavit, that the plaintiff's cause of action against him does amount to *ten* pounds or upwards, shall be first made and filed with the clerk of the rules, and the sum specified in such affidavit indorsed by him on such declaration, before the same is left with the turnkey." But this rule is confined to cases where the prisoner is charged with a *new* action; and does not apply, where he is proceeded against by the *same*

<sup>v</sup> Q. as to the affidavit; which does not seem to be necessary, where the defendant is in custody of the mar-

shal. *Ante*, 202.

<sup>w</sup> 5 T. R. 325. and see Append. Chap. X. XI. [B.]

<sup>x</sup> R. E. 15 G. II. *Reg.* 3.



plaintiff, for the cause of action expressed in the process<sup>1</sup>.

When a bill is filed against a prisoner in custody of the marshal, if a copy of it be delivered for him to the turnkey, *four* days exclusive before the end of the term, a rule to plead given, and a plea demanded, the defendant shall plead as of that term; but if the bill be not filed, and the copy delivered, four days exclusive before the end of the term, the defendant may imparl until the next term<sup>2</sup>,

<sup>1</sup> Barnes, 75. Pr. Reg.      <sup>2</sup> R. E. 5 W. & M. Reg.  
330. Caf. Prac. C. B. 144. 3. (a).  
S. C.

## CHAP. XI.

*Of the PROCEEDINGS against PRISONERS  
in the actual Custody of the SHERIFF, &c.  
previous to the Plea.*

**B**EFORE the making of the statute 4 & 5 W. & M. c. 21. there could have been no declaration in this court, against a defendant in custody of the sheriff, or other officer by whom he was arrested; but the plaintiff was obliged to bring a *habeas corpus cum causâ*, and so turn him over to the custody of the marshal, in order to charge him with a declaration<sup>a</sup>. But now, by the above statute, which was passed to relieve plaintiffs from the trouble and expence of bringing up prisoners by *habeas corpus*<sup>b</sup>, “If any defendant be taken or charged in custody, at the suit of any person, upon any writ, out of any of the courts at Westminster, and imprisoned for want of sureties for his appearance, the plaintiff in such writ may, before the end

<sup>a</sup> See the preamble to the 1051. 1 T. R. 192. *Ante*, Statute, R. M. 1654. § 11. 174.

R. E. 5 W. & M. Reg. 3. § 1. <sup>b</sup> 1 Wils. 120. 1 T. R. (a). 1 Wils. 120. 2 Bur. 192.

“ of the next term after such writ is returnable,  
“ *declare*<sup>c</sup> against such prisoner, in the court out  
“ of which the writ issued, whereupon the said  
“ prisoner was taken and imprisoned, or charged  
“ in custody; and may cause a true copy thereof  
“ to be delivered to such prisoner, or to the  
“ gaoler or keeper of the prison or gaol, in  
“ whose custody such prisoner shall be or re-  
“ main: to which declaration the said prisoner  
“ shall appear and plead; and if such prisoner  
“ shall not appear and plead to the same, the  
“ plaintiff in such case shall have judgment, in  
“ such manner as if the prisoner had appeared,  
“ and refused to answer or plead to such declara-  
“ tion.”

And by the same statute, § 3. “ In all declara-  
“ tions, against any prisoner detained in prison,  
“ by virtue of any writ or process issued out of  
“ the court of King’s Bench, it shall be alledged  
“ in custody of what sheriff, bailiff, or steward  
“ of any franchise, or other person having the  
“ return and execution of writs, such prisoner  
“ shall be, at the time of such declaration, by  
“ virtue of the process of the said court, at the

<sup>c</sup> The words of the statute are, that the plaintiff may *de-  
clare*, &c. and therefore, though usual in practice, it does  
not seem to be necessary to file a *bill*, against a prisoner in  
custody of the sheriff, &c.

“suit of the plaintiffs; which allegation shall be “as good and effectual, to all intents and purposes, as if such prisoner or prisoners were in “the custody of the marshal.” If the declaration, therefore, do not alledge, either expressly or by implication, at whose suit the defendant is in custody, it will be bad on a general demurrer<sup>d</sup>. This allegation, however, is only necessary, where the plaintiff proceeds upon process in trespass, or by *attachment* of privilege.

Upon this statute, a defendant in the actual custody of the sheriff or other officer, upon mesne process, may be proceeded against by the *same* plaintiff, at whose suit he was arrested, or by a *third* person; by the former upon the original *caption*, by the latter upon a subsequent *charge*, and by either of them upon a *recaption*, by virtue of an *escape* warrant<sup>e</sup>.

The mode of charging a defendant in the actual custody of the sheriff, &c. for a *bailable* cause of action, is by making an affidavit thereof, and suing out *process*, which should be duly marked or indorsed for bail, and left at the sheriff's office. But if the cause of action be not bailable, the *same* plaintiff, or a *third* person,

<sup>d</sup> 2 Ld. Raym. 1362. 1      • For the time of declaring  
Wils. 119, 120. and see App. upon a *recaption*, see R. T.  
pend. Chap. X. XI. [C.]      6 Ann. 6 Mod. 21, 254.

may proceed against the defendant, as if he were at large, by serving him with a copy of process<sup>f</sup>.

When the defendant is taken and detained, or charged in custody of the sheriff, &c. the statute expressly provides, that the plaintiff may declare against him, before the end of the *next* term after the process is returnable; and by rule of E. 5 W. & M.<sup>g</sup> if the declaration be not filed within that time, the prisoner shall be discharged on common bail. But a subsequent rule<sup>h</sup> having rather ambiguously required, that if the defendant should remain in custody for *two* terms, and the plaintiff should not declare against him within that time, the defendant should be discharged out of custody, after the end of the *second* term after such imprisonment; the judges, in favour of liberty, determined, that where a defendant was arrested in one term, on a writ returnable the next, the term in which the defendant was arrested should be reckoned as one of the two terms; and consequently, that the defendant should be discharged, for want of a declaration, after the end of the same term in which the writ was returnable<sup>i</sup>. This practice,

<sup>f</sup> 1 T. R. 192.

<sup>h</sup> R. T. 2 Geo. I.

<sup>g</sup> Reg. 3. § 6. and see <sup>i</sup> 3 Bur. 1448. 4 Bur. Carth. 469. 1 Salk. 98. 2060. S. C.

however,



however, has been since altered; and it is now settled, agreeably to the letter and intention of the statute, that "in all cases where a prisoner "is taken or charged in custody, by mesne "process issuing out of this court, the plaintiff "may declare against him, before the end of "the next term after the return of the process, "by virtue whereof he was taken or charged in "custody \*." And a plaintiff need not declare against a prisoner, until the end of the term next after the return of the writ, even though there was time in the term in which the writ was sued out, to have made it returnable in that term, and it be not in fact made returnable until the next term<sup>1</sup>. The term however, in which the process, whereon the defendant was arrested, is returnable, is still accounted one of the two terms; although it be returnable on the last day of the term<sup>m</sup>. And the plaintiff cannot declare *before* the return of the process, upon which the defendant was taken or charged in custody<sup>n</sup>.

If the defendant be taken and detained, or charged in custody of the sheriff, &c. for a *bailable* cause of action, a copy of the declara-

\* R. H. 26 Geo. III.

<sup>n</sup> R. E. 5 W. & M. Reg. 3.

<sup>1</sup> 6 T. R. 547.

§ 1.

<sup>m</sup> R. T. 2 Geo. I. (a).

tion should be delivered personally to the defendant, or left for him with the gaoler, or keeper of the gaol or prison, in whose custody he is confined<sup>o</sup>; it not being sufficient, in such case, to leave a declaration in the office, to which the defendant is not obliged to plead, and on which the plaintiff cannot take a regular judgment<sup>p</sup>. And “if any gaoler or keeper of a prison, having received a copy of a declaration, against any prisoner in his custody, shall suppress the same, and not deliver it forthwith unto such prisoner, an attachment shall be issued against him<sup>q</sup>.” But if the defendant be served, in custody of the sheriff, &c. with a copy of process, at the suit of the *same* or a *different* plaintiff, it is not necessary that a copy of the declaration should be delivered personally to the defendant, or left for him with the gaoler or turnkey; but it may be delivered or filed, absolutely or *de bene esse*, and the plaintiff may proceed thereon, as if the defendant were at large<sup>r</sup>.

The plaintiff having declared, an *affidavit* should be made and filed, with the clerk of the

<sup>o</sup> Stat. 4 & 5 W. & M. c. 21.

<sup>q</sup> R. E. 5 W. & M. Reg. 3.

<sup>r</sup> § 7.

<sup>p</sup> 1 Str. 474.

<sup>r</sup> 1 T. R. 192.

rules, before the first day of the ensuing term<sup>1</sup>; stating the delivery of a copy of the declaration, and the time when, and person to whom, the same was delivered<sup>2</sup>; if to a gaoler or turnkey, that he acknowledged the defendant was then a prisoner in his custody<sup>3</sup>; and that the defendant was arrested, or charged in custody, by process of this court, returnable before the delivery of the copy<sup>4</sup>. The time when such affidavit was filed, should be entered thereon, by the clerk of the rules, and a copy of it produced to the secondary, before judgment<sup>5</sup>. Hence it is necessary, and usual in practice, where the defendant is in custody of the sheriff, &c. to have *three* copies of the declaration; one to be delivered to the defendant, or left for him with the gaoler or turnkey; another to be annexed to the original affidavit of such delivery, and filed with the clerk of the rules; and a third, to be annexed to an office-copy of such affidavit: on this last copy, the master will give a rule, which the clerk of the rules enters in his paper, for the defendant to appear and plead; and on default thereof, judgment may be signed<sup>6</sup>.

<sup>1</sup> R. H. 26 Geo. III.

<sup>2</sup> R. E. 5 W. & M. Reg. 3.

<sup>3</sup> R. E. 5 W. & M. Reg. 3. §. 2. (a).

<sup>4</sup> § 2. and see Append. Chap.

<sup>5</sup> *Id. ibid.* (b).

X. XI. [D.]

The times of appearing and pleading, when the defendant is in custody of the sheriff, &c. are regulated as follows: That "upon every  
 "arrest, by mesne process out of this court,  
 "returnable the first day of Easter or Michael-  
 "mas term, if a copy of the declaration be de-  
 "livered against the defendant, before one month  
 "from the day of Easter, or the morrow of All  
 "Souls," (that is, before the *third* return of  
 Easter term, or of Michaelmas term, as it then  
 stood"), "and affidavit thereof made and filed,  
 "and the defendant do not appear, before the  
 "end of *ten* days after those terms respectively,  
 "judgment may be entered against him, if rules  
 "have been given: but if he appear within that  
 "time, he shall imparl until the next term;  
 "unless the action be in London or Middlesex,  
 "and the defendant be in prison within forty  
 "miles of London or Westminster: Then, though  
 "he appear before the expiration of that time,  
 "he shall plead *two* days before the effoin-day  
 "of the next term: and in default thereof,  
 "rules having been given, judgment may be  
 "entered against him as aforesaid\*."

\* This term having been  
 since shortened, by the statute  
 24 Geo. II. c. 48,

\* R. E. 5 W. & M. Reg. 3.  
 § 3.

That

That "if a copy of the declaration be delivered against such defendant, on or after one month from the day of Easter in Easter term, or the morrow of All Souls in Michaelmas term, or in Hilary or Trinity term, and thereupon the plaintiff give rules to appear and answer, then, if the defendant appear *two* days before the effoin-day of the next term, he shall imparl until the next term; but if he do not appear within that time, judgment may be given against him<sup>1</sup>."

And that "if a writ be returnable in any term, and a copy of the declaration have been delivered before the effoin-day of the next term, the plaintiff, in such next term, may give rules to appear and answer: And if the defendant do not appear and plead, upon the expiration of the rules, judgment shall be given against him<sup>2</sup>."

When the defendant is in custody of the sheriff, &c. the demand of a plea is unnecessary<sup>3</sup>. And where a plea is filed by the defendant, at an earlier time than by the rules of the court he is compellable to plead, he must, in order to prevent surprise, give no-

<sup>1</sup> R. E. 5 W. & M. Reg. 3.      <sup>2</sup> 1 T. R. 591. 6 T. R.

§ 4.

524.

<sup>3</sup> *Id.* § 5.



tice of his plea<sup>b</sup>: But no such notice is required, where the plea is filed in regular time<sup>c</sup>. In other respects, the proceedings subsequent to the declaration, against a defendant in custody of the sheriff, &c. are similar to the proceedings against him, when in custody of the marshal.

<sup>b</sup> 4 T. R. 664.

<sup>c</sup> 5 T. R. 473.

## C H A P. XII.

*Of the PROCEEDINGS against PRISONERS  
in the actual Custody of the MARSHAL or  
SHERIFF, &c. subsequent to the Plea.*

**A**FTER the delivery of the declaration against a prisoner, in custody of the marshal or sheriff, &c. except on a *surrender* in discharge of bail, the plaintiff should proceed to trial, or final judgment, within *three* terms next after such declaration delivered, if by the course of the court he can so proceed; of which three terms, the term of the declaration is one<sup>a</sup>; and should cause the defendant to be charged in execution, within *two* terms next after such trial or judgment; of which two terms, the term wherein the trial was had, or judgment obtained, is also one<sup>a</sup>; in case no writ of error be depending, nor injunction obtained, for stay of proceedings: And if any writ of error be depending, or injunction obtained, then within *two* terms next after the judgment be affirmed, the writ of error *non-*

<sup>a</sup> R. H. 26 Geo. III. And see R. T. 2 Geo. I. and the notes thereon.

*pros'd*

*pros'd* or discontinued, or the injunction dissolved; including the term of the affirmance, *nonpros*, discontinuance, or dissolving the injunction<sup>a</sup>.

In case of a *surrender* to the marshal, in discharge of bail, after declaration, the plaintiff should proceed to trial, or final judgment, within *three* terms next after such surrender, and due notice thereof, if by the course of the court he can so proceed; of which three terms, the term of the surrender is one<sup>b</sup>; or, in case of a surrender in discharge of bail, after final judgment, he should cause the defendant to be charged in execution, within *two* terms next after such surrender, and due notice thereof; of which two terms, the term of the surrender is also one<sup>b</sup>; in case no writ of error be depending, nor injunction obtained, for stay of proceedings: And if any writ of error be depending, or injunction obtained, then within *two* terms next after the judgment be affirmed, &c.<sup>b</sup> But when a defendant surrenders in discharge of bail, in the vacation after trial and verdict against him, the preceding term is not reckoned as one of

<sup>a</sup> R. T. 2 Geo. I. (b). 3 Bur. 1787. 4 Bur. 2060.  
<sup>1</sup> Wils. 297. <sup>2</sup> Wils. 325. R. H. 26 Geo. III.

the two; but the plaintiff is allowed the two following terms to charge him in execution<sup>c</sup>.

The mode of proceeding to trial and final judgment against a prisoner, is the same as in common cases, except that notice of trial to the gaoler or turnkey is deemed sufficient<sup>d</sup>. And in order to *charge* a defendant in execution, the proceedings must be entered on record, and the judgment-roll docketed and filed: after which, if the defendant be a prisoner in the King's Bench prison, the plaintiff's attorney should obtain a rule, from the clerk of the rules, for the marshal to acknowledge him in his custody<sup>e</sup>; and the marshal, being served with a copy of the rule, will write his acknowledgment at the bottom of it, which ought to be of the *same* term in which the defendant is charged in execution, and not of a *preceding* term<sup>f</sup>. A *committitur*-piece should be then drawn up, on unstamped parchment, in the form of a bail-piece<sup>g</sup>, and filed with the clerk of the judgments, in order that he may enter the *committitur* on record<sup>h</sup>: And it is usual, before this is done, to enter the *committitur* in the marshal's book, kept at the

<sup>c</sup> 6 T. R. 776.

<sup>d</sup> 1 Str. 248.

<sup>e</sup> R. T. 2 Geo. I. § 2. (b).

<sup>f</sup> 1 T. R. 464.

<sup>g</sup> Append. Chap. XII. [A.]

<sup>h</sup> *Id.* [B.]

King's Bench office<sup>1</sup>. The *committitur* should be actually entered on record, before the end of the second term inclusive after the judgment, otherwise the defendant is supersedeable; and there is no extension of the time to the continuance-day after term, nor is it sufficient, that there be an entry in the marshal's book in time<sup>2</sup>. It is also usual for the clerk of the judgments, at the end of every term, to send to the marshal a docket or list of the *committiturs*, which have been entered in that term, stating therein the names of all the plaintiffs, at whose suit the defendant is charged in execution; from which docket or list, an entry is made by the marshal. And where the clerk of the judgments had made a mistake, in omitting the name of one of several plaintiffs, in his docket transmitted to the marshal, it was rectified by the court, at the instance of the clerk<sup>3</sup>. Where the defendant has been once committed, a second commitment for the same cause, before the first is discharged, or notice given that it is abandoned, is clearly informal<sup>4</sup>. But where the defendant being acknowledged by the marshal to be in his custody,

<sup>1</sup> 2 Bur. 1049. Imp. K. B. 589.

<sup>2</sup> Gage and another v. Parsons, M. 36 Geo. III.

<sup>3</sup> 2 Str. 1215, 1226. 3 Bur. 1841.

<sup>4</sup> 1 T. R. 227.



at the suit of A, it was moved that he might be charged in execution also, on a judgment of *outlawry* in another action, at the suit of B, the court ordered the same in the first instance<sup>a</sup>.

To charge the defendant in execution in a county-gaol, a writ of *capias ad satisfaciendum* must be sued out, and lodged with the sheriff<sup>b</sup>. If the defendant be removed, after declaration, to the *Fleet*, or found in the prison of an *inferior* court, the mode of charging him in execution is by writ of *habeas corpus ad satisfaciendum*, returnable in court, on a day certain in term; and the number of the judgment-roll must be indorsed on the *habeas corpus*<sup>c</sup>. Nor is the prisoner bound to give notice of his removal; but the plaintiff must take notice of it at his peril: Therefore where a prisoner, who had been surrendered in discharge of his bail, and afterwards removed to the *Fleet*, without giving any notice to the plaintiff, was charged in execution, as a prisoner in the King's Bench, the court granted a *supersedeas*; for the plaintiff should have demanded to see the prisoner, and, if not produced, would have known where to find him, and bring him back by *habeas corpus*, to charge

<sup>a</sup> *Amos v. Martin*, T. 36 see Barnes, 389.

Geo. III. <sup>b</sup> 1 Sid. 100. R. M. 1654.

<sup>c</sup> Imp. K. B. 514. But § 7. R. T. & Geo. I. (8).

him; and it would be putting difficulties upon prisoners, to oblige them to give notice<sup>1</sup>. When the defendant is charged, by any of these means, the execution is considered as executed; and therefore, where the plaintiff afterwards died, it was holden that his executors were not bound to revive the judgment by *scire facias*; or to charge the defendant in execution *de novo*<sup>2</sup>.

If the declaration be not delivered, and an affidavit thereof duly made and filed, (where the defendant is in custody of the sheriff, &c.) or if the plaintiff do not proceed to trial or final judgment, or cause the defendant to be charged in execution, in due time, the defendant may be discharged out of custody, by writ of *superfedeas* or otherwise, according to the course of the court, on filing common bail by *bill*, or entering a common appearance by *original*; unless, upon notice given to the plaintiff's attorney, good cause be shewn to the contrary<sup>3</sup>. And the defendant may also be discharged out of custody, when the action is abated, discontinued, or decided in his favour.

To *discharge* a prisoner for not declaring, or for not proceeding to final judgment or execu-

<sup>1</sup> 2 Str. 1153.

see R. E. 5 W. & M. Reg. 3.

<sup>2</sup> *King v. Millett*, H. 22 Geo. III.

§ 6. R. T. 2 Geo. I. Say. Rep. 111.

<sup>3</sup> R. H. 26 Geo. III. And

tion,

tion, in due time, the defendant's attorney or agent should obtain a *certificate*<sup>1</sup>, or copy of the causes wherewith he stands charged, from the clerk of the papers of the King's Bench prison, if in custody of the marshal; or, if in custody of a sheriff or other officer, from the gaoler or keeper of the prison in which he is confined<sup>2</sup>; and, in the latter case, an *affidavit* must be made, of his having signed the same<sup>3</sup>: upon which a summons should be taken out, and served on the plaintiff's attorney or agent, to attend a judge, and shew cause, why the defendant should not be discharged out of the custody of the *marshal*; or, if in custody of a sheriff, &c. why a writ of *superfedeas* should not issue to discharge him, on filing common bail by *bill*, or entering a common appearance by *original*. At the time appointed by the summons, the plaintiff's attorney or agent either attends and consents to an order, shews cause against it, or does not attend. In

<sup>1</sup> It was formerly necessary to get a certificate from the clerk of the declarations, that no bill or declaration was filed in his office against the defendant. R. T. 2 Geo. I. § 1. (b). 1 Str. 474. But this certificate was found to be useless; as the filing of a

bill or declaration might be shewn for cause against the defendant's discharge, and therefore it is now dispensed with.

<sup>2</sup> R. T. 2 Geo. I. § 1. (b).

<sup>3</sup> Imp. K. B. 522, 525. and see Append. Chap. XII. [C.]

the

the latter case, an *affidavit* being made of the service and attendance<sup>w</sup>, the judge will make an order for the defendant's discharge, on the *first* summons<sup>x</sup>, if the application be for not declaring: but if it be for not proceeding to judgment or execution in due time, there must be *three* summonses<sup>y</sup>, before the judge will make an order for non-attendance; and in a country cause, the order, on an attendance, is not absolute in the first instance, but only an order *nisi*, unless cause be shewn in a week, to give the agent an opportunity of writing to his client for instructions<sup>z</sup>. When an order is made for the defendant's discharge, common bail should be filed with the clerk of the common bails by *bill*, or a common appearance entered with the *filacer* by *original*<sup>a</sup>: and if the defendant be in custody of the marshal, a certificate from the clerk of the bails or *filacer*, of the bail being filed, or an appearance entered, will be a sufficient ground for discharging him, without a *superfedeas*<sup>b</sup>. But if the defendant be in custody of a sheriff or other officer, he must sue out a writ of *superfedeas*<sup>c</sup>;

<sup>w</sup> Append. Chap. XII.

<sup>a</sup> Imp. K. B. 526.

[D.]

<sup>b</sup> R. T. 2 Geo. I. § 2. (b).

<sup>x</sup> Imp. K. B. 523.

<sup>c</sup> Append. Chap. XII.

<sup>y</sup> *Id.* 526.

[E.]

<sup>z</sup> *Id. ibid.*

for issuing which by *bill*, the bail-piece, signed by one of the judges, is a warrant to the officer, with whom it is to be left; and he delivers it over to the clerk of the common bails to be filed<sup>d</sup>. By *original*, the writ of *superfedeas* is made out by the *filacer*<sup>e</sup>.

Having thus shewn in what manner the defendant is to be discharged, it will be proper to consider what causes will be sufficient to prevent his discharge, for not declaring, proceeding to trial or final judgment, or charging him in execution. Where there are two defendants, and one of them is arrested and detained in prison, but the other absconds, so that the plaintiff is obliged to proceed to outlawry against him, this seems to be a good cause for not declaring against the defendant who is in prison, until the other defendant be outlawed<sup>f</sup>. But it is said, that in such case the plaintiff must move for time to declare, against the defendant in custody<sup>g</sup>.

After declaration, if the *venue* be laid in a county where the assizes are holden but once a

<sup>d</sup> R. T. 2 Geo. I. § 2. (b). *semb. contra.*

<sup>e</sup> Trye, *in pref.*

<sup>f</sup> *Per Cur.* E. 12 Geo. III.

<sup>g</sup> Barnes, 401. 2 Blac. 2 Crompt. 9.

Rep. 759. Pr. Reg. 327.

Q

year,



year, it may be impossible, by the course of the court, for the plaintiff to try his cause in *three* terms: this therefore, when it happens, is allowed to be a good cause for not proceeding to trial<sup>a</sup>. So where the writ, in a country cause, was returnable in Michaelmas term, and the plaintiff declared in Hilary, and the defendant imparled till Easter term, by which means the plaintiff was disabled from proceeding to trial, till the next summer assizes, a judge refused to grant a *supersedeas*<sup>1</sup>. And in like manner, where the court take time to give judgment on *demurrer*, &c. they will not suffer the plaintiff to be prejudiced, but will allow this to be a good cause for not proceeding to final judgment<sup>2</sup>.

After trial or final judgment, a writ of error and injunction are, whilst they continue in force, good causes for not charging the defendant in execution<sup>3</sup>. And a regular treaty of accommodation, or agreement for a compromise, is, in any stage of the action, a good cause for not declaring, &c.<sup>4</sup> But no treaty or agreement is sufficient to prevent a *supersedeas*, unless it be in writing, signed by the defendant or his attor-

<sup>a</sup> Barnes, 383.

<sup>1</sup> 2 Will. 380. R. H. 26.

<sup>2</sup> *Cripps and Wiggin*, T. Geo. III.

28 Geo. III.

<sup>3</sup> 4 Bur. 2063. 3 Will.

<sup>4</sup> Barnes, 383.

455.

ney, or some person duly authorized by the defendant; and it be expressed therein, that proceedings are stayed at the defendant's request<sup>a</sup>.

If the defendant be superseded, or supersedeable, for want of proceedings *before* judgment, the plaintiff may, nevertheless, take or charge him in execution, at any time *after* judgment<sup>b</sup>. But he cannot do so, if the defendant be superseded, or supersedeable, for want of being charged in execution<sup>c</sup>. And in the latter case, the defendant cannot be holden to special bail in a second action, upon the judgment<sup>d</sup>. The *superseas*, however, in the first action, cannot be pleaded in bar of the second<sup>e</sup>: And after judgment obtained in the second action, the defendant is again liable to be taken in execution<sup>f</sup>.

<sup>a</sup> R. H. 26 Geo. III.

<sup>b</sup> R. T. 2 Geo. I. § 1. (c).

<sup>c</sup> R. T. 2 Geo. I. § 1. (c).

<sup>d</sup> Cowp. 72.

<sup>e</sup> T. R. 591. (a). *Davies*

<sup>f</sup> 1 T. R. 273.

and *Brown*, in the exchequer,

<sup>g</sup> Cowp. 72.

M. 27 Geo. III. S. P.

## CHAP. XIII.

*Of the ATTORNIES and other OFFICERS  
of the Court; their DUTIES, PRIVI-  
LEGES, and DISABILITIES: and of  
PROCEEDINGS by and against them.*

**T**HE officers of this court are first, and principally, the judges, consisting of the Lord Chief Justice, created by writ, and three other judges, created by letters patent; who, by the statute 13 W. III. c. 2. hold their places *quamdiu bene se gesserint*, and not, as formerly, *durante bene placito*: And by the statute 1 Geo. III. c. 23. enacted at the earnest recommendation of the king himself from the throne, the judges are continued in their offices during their good behaviour, notwithstanding any demise of the crown, (which was formerly held<sup>a</sup> immediately to vacate their seats;) his majesty having been pleased to declare, that he looked upon the independence and uprightness of the judges, as essential to the impartial administration of justice<sup>b</sup>; as one of the best securi-

<sup>a</sup> 2 Ld. Raym. 747.

<sup>b</sup> Com. Journ. 3 Mar. 1761.

ties of the rights and liberties of his subjects; and as most conducive to the honour of the crown. Secondly, the *clerk of the crown*<sup>c</sup>, or king's *coroner* and attorney, usually called the *master* of the crown office, who holds his place for life, by letters patent under the great seal; and has the appointment of his secondary and clerk in court, and of the clerk of the rules, examiner, calendar-keeper, and clerk of the grand-juries. Thirdly, the *prothonotary*, or *chief clerk* for enrolling pleas, in civil causes depending between party and party, on the plea side of the court; and particularly by *bill*<sup>d</sup>. This officer is appointed for life, by the chief justice of the court for the time being; and has the appointment of the *secondary*, or deputy to the chief clerk, usually called the *master* of the King's Bench office, and his *assistant*, the clerk of the *rules*, the clerk of the *papers*<sup>e</sup>, the clerk of the *declarations*, the clerk of the *common bails*, *posseas* and *estreats*, the clerk of the *judgments*, the clerk of the *dockets*, *commitments* and *satisfactions*, and the *signer* of the writs; all of whom, except the master and his assistant, and

<sup>c</sup> Show. P. C. 111. and P. C. 111.

see Cal. temp. Talb. 97.

<sup>e</sup> 1 Vent. 296. 2 Mod.

<sup>d</sup> 1 Ch. Cal. 20. Show. 95. S. C.

the signer of the writs, hold their places for life, by writing under the hand and seal of the chief clerk; and most of them have deputies, to assist in the execution of their offices.

Other officers appointed by the chief justice are the *filacers*, *exigenter*, and clerk of the *out-lawries*<sup>†</sup>, for proceedings by *original writ*; and the clerk of the *treasury*, and keeper of the *writs* and *records* of the court, commonly called the *custos brevium*<sup>‡</sup>. The office of *custos brevium*, as well as that of *protbonotary*, has usually been granted for the lives of two persons, and the survivor of them; and the *custos brevium* has annexed to his office, the making up of records of *nisi prius*, except in *Middlesex*: and appoints the clerk of the *inner* and *upper treasury*, the clerk of the *outer treasury*, and the clerks of *nisi prius*, for making up the above records. The chief justice also appoints the clerk of *nisi prius* for *Middlesex*, whose business it is to transcribe from the plea-rolls, the records of *nisi prius*, in that county, and to examine and seal the same, and to receive and file the *warrants* of attorney on the plea side of the court. The three other judges have the appointment of the *signer* of the bills of *Mid-*

<sup>†</sup> Trye, in *pref.*

<sup>‡</sup> 1 Lev. 1.



*delex*; and each of the judges appoints his own clerk.

Besides the officers that have been mentioned, there are others who derive their authority more immediately from the crown, namely, the *marshal*<sup>a</sup>, the *sealer* of the writs, and the chief *usher* and *crier* of the court. The office of *marshal* was granted by King James the First, in the 14th year of his reign, to *Sir William Smith* knight, in fee; and the appointment to that office, as well as of the inferior officers, continued in the proprietors of the inheritance of the prison, till the statute 27 Geo. II. c. 17. by which the office was revested in the crown; and by that statute, the marshal has the appointment of all inferior officers belonging to his office, such as the *deputy marshal*, *chaplain*, clerk of the *papers* of the King's Bench prison, and clerk of the *day rules*; (which latter officers, as well as the marshal, must be resident within the prison, or its rules<sup>b</sup>;) four *tipstaffs*, (one for each of the judges,) and the *turnkeys*, &c. The office of *sealer* of the writs was granted by King Charles the Second, in the 25th year of his reign, to the Duke of Cleve-

<sup>a</sup> 2 Salk. 439.

<sup>b</sup> 4 T. R. 716. 5 T. R. 511.

*land*, and his heirs male, in default of issue male of Lord *George Fitzroy*; and is now vested in the Duke of *Grafton*, who exercises the same by deputy. The chief *usher* and *crier* of the court holds his place for life, by letters patent under the great seal; and executes the same by two deputy ushers, and two deputy criers, who, according to a late determination<sup>k</sup>, are considered as distinct and independent officers.

There are other officers, who may here be noticed, though they are not properly officers of the court. These are the officers who attend on the trial of causes at *nisi prius*, in *London* and *Middlesex*, consisting of the marshal and associate, clerk of *nisi prius*, crier, and train-bearer, who are appointed by the chief justice; and the officers belonging to the different *circuits*, namely, the clerk of assize, associate, clerk of arraigns, clerk of indictments, judge's marshal, crier, clerk, and tipstaff.

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An *attorney* is a person put in the place, stead, or *turn* of another, to manage his law concerns<sup>l</sup>; and before the statute Westm. II. (13 Edw. I.) c. 10. the parties to a suit could not have

<sup>k</sup> *Peake's Cas. Ni. Pri.* 182.

<sup>l</sup> 3 *Blac. Com.* 25.  
appeared

appeared by attorney, without the king's special warrant, by writ or letters patent; but must have attended the court in person<sup>m</sup>. By the above and other ancient statutes, a general liberty was given to the parties, of appearing and prosecuting or defending their suits by attorney; in consequence whereof the increase of attornies was so great, that several acts of parliament were made to regulate them, and to limit their number<sup>n</sup>. And by the statute 3 Jac. I. c. 7. it was enacted, that "none should from thenceforth be admitted attornies, in any of the king's courts of record at *Westminster*, but such as had been *brought up* in the same courts, or otherwise well practised in soliciting causes; and had been found by their dealings, to be skilful and of honest dispositions." In confirmation of this statute, a rule of court was made, that none should be admitted an attorney of this court, unless he should have served, by the space of five years, as a clerk to some judge, serjeant at law, practising counsel, attorney, clerk, or officer of one of the courts at *Westminster*; and were also, on *examination*, found of good ability and honesty for such em-

<sup>m</sup> Co. Lit. 128. a. 2 Inst. Hen. VI. c. 7. See also the 249, 378. F. N. B. 25. C. Rules of B. 9 Eliz. M. 15  
 Gilb. C. P. 32. Eliz. and T. 24 Eliz. C. P.

<sup>n</sup> 4 Hen. IV. c. 18. 33

ployments.

ployments°. And it was then usual, to nominate twelve or more able practisers of the court yearly, whose business it was to examine such persons as should desire to be admitted attorneys; which persons were first to attend the prothonotary, with their proof of service, and then to repair to the persons appointed to examine them, and being approved, were to be presented to the court and sworn in, unless some just exception were made against them².

At length, by the statute 2 Geo. II. c. 23.³, *continued* by the 12 Geo. II. c. 13. § 3., and 22 Geo. II. c. 46. § 2. and made *perpetual* by the 30 Geo. II. c. 19. § 75. it was enacted, that  
 “ no person shall be permitted to act as an at-  
 “ torney, or to sue out any writ or process, or  
 “ to commence, carry on, or defend any action  
 “ or actions, or any proceedings, either before  
 “ or after judgment obtained, in the name or  
 “ names of any other person or persons, in his  
 “ majesty’s court of King’s Bench, &c. unless  
 “ such person shall have been bound, by *contract*  
 “ *in writing*, to serve as a clerk, for and during  
 “ the space of five years, to an attorney duly and  
 “ legally sworn and admitted according to that  
 “ act; and that such person, for and during the

° R. M. 1654. § 1.

also R. M. 3 Ann.

² Same Rule, § 4. See    ³ § 5.

“ said

" said term of five years, shall have *continued* in  
 " such service; and also unless such person, after  
 " the expiration of the said term of five years,  
 " shall be *examined, sworn, admitted, and enrol-*  
 " *led*, in manner therein mentioned: And that  
 " in case any person shall in his own name, or in  
 " the name of any other person, sue out any writ  
 " or process, &c. as an attorney or solicitor, for  
 " or in expectation of any gain, fee, or reward,  
 " without being admitted and enrolled as afore-  
 " said, every such person, for every such offence,  
 " shall forfeit and pay 50*l.* to the use of the per-  
 " son who shall prosecute him for the said of-  
 " fence; and is thereby made incapable to  
 " maintain or prosecute any action or suit, in  
 " any court of law or equity, for any fee, re-  
 " ward, or disbursements, on account of prose-  
 " cuting, carrying on, or defending any such ac-  
 " tion, suit, or proceeding'." By subsequent  
 statutes, it is made penal for any person to act as  
 an attorney in the *county court*', or at any gene-  
 ral or quarter *sessions* of the *peace*', unless such  
 person shall have been duly admitted an attor-  
 ney, and enrolled as aforesaid.

And for the better preventing unqualified per-  
 sons from being admitted attornies and solicitors,

' § 24.

' 12 Geo. II. c. 13. § 7.

' 22 Geo. II. c. 46. § 12.

and



and for rendering the said act of 2 Geo. II. more effectual, "every person who shall be bound by "contract in writing to serve as a clerk to any "attorney or solicitor, as by the said act is directed, shall within three months next after "the date of every such contract, cause an *affidavit* to be made and duly sworn, of the actual execution of every such contract, by every "such attorney or solicitor, and the person so to be bound to serve as a clerk as aforesaid; "and in every such *affidavit* shall be specified "the names of every such attorney and solicitor, "and of every such person so bound, and "their places of abode respectively, together "with the day of the date of such contract"; "and every such affidavit shall be *filed*, within "the time aforesaid, in the court where the attorney or solicitor to whom every such person "respectively shall be bound, hath been enrolled "as an attorney or solicitor, with the respective "officers or their deputies therein mentioned, "who shall make and sign a *memorandum* or "mark of the day of filing every such affidavit, "at the back or bottom thereof"; and that no "person who shall become bound as aforesaid "shall be admitted or enrolled an attorney or "solicitor, in any court in the said act men-

Append. Chap. XIII. v 22 Geo. II. c. 46. § 3.  
[A.]

"tioned,

"tioned, before such affidavit, so marked by the  
 "proper officer, shall be produced, and openly  
 "read in the court where such person shall be  
 "admitted and enrolled an attorney or solicitor". The officer appointed for this purpose, in the court of King's Bench, is the chief clerk of that court, or his deputy<sup>x</sup>; who is directed to keep a book, wherein shall be entered the substance of such affidavit, specifying the names and places of abode of every such attorney or solicitor, and clerk or person bound as aforesaid, and of the person making such affidavit, with the date of the articles or contract, and the days of swearing and filing every such affidavit respectively, for which a fee of two shillings and sixpence is allowed to be taken, and no more<sup>y</sup>. And *indemnity* acts are occasionally passed, relieving persons who have neglected to file their affidavits within the limited time.

By the *revenue* laws, the contract of service is subject to the stamp duty of *seven* shillings; and to the duty of *sixpence* for every twenty shillings of every sum of 50*l.* or under, and to the duty of *one shilling* for every twenty shillings of every sum amounting to more than 50*l.* which shall be given, paid, contracted, or agreed

<sup>x</sup> 22 Geo. II. c. 46. § 4.

<sup>y</sup> 22 Geo. II. c. 46. § 6.

<sup>z</sup> *Id.* § 5.

for,

for, with or in relation to every clerk, and proportionably for greater or lesser sums; to be paid by the master, within two months after the execution of the contract". And by a late act of parliament<sup>a</sup>, an additional stamp duty of 100l. is imposed upon every contract in writing, whereby any person shall become bound to serve as a clerk, in order to his admission as a solicitor or attorney, in any of his majesty's courts at *Westminster*, over and above all other duties payable by law upon or in respect of the same: And it is thereby enacted, that "no person, "who by any such contract shall be bound to "serve as a clerk as aforesaid, shall be admitted "to be a solicitor or attorney in any of the said "courts, unless the *indenture* or other writing "containing such contract, duly stamped according to the directions of the said act, shall be "enrolled or registered with the proper officer "to be appointed for that purpose, in the court "wherein such person shall propose to be afterwards admitted a solicitor or attorney, by virtue of his service under such contract; together with an *affidavit* of the time of the execution of the contract by such clerk; and in "case such indenture or other writing shall not "be enrolled or registered in such court, within

<sup>a</sup> 8 Ann. c. 9. § 32, 37.      <sup>a</sup> 34 Geo. III. c. 14. § 1.

" fix

“ six months next after the execution thereof,  
 “ together with such affidavit of the time of the  
 “ execution of the contract, then the service of  
 “ such clerk under such indenture or writing  
 “ shall be deemed to commence from the time  
 “ of such enrolment or registry only, and not  
 “ from the execution of such indenture or writ-  
 “ ing<sup>b</sup>.” This act of parliament, considered as  
 a matter of regulation, will probably in time be  
 productive of the most beneficial consequences.

No attorney or solicitor is allowed to have  
 more than *two* clerks, at one and the same  
 time<sup>c</sup>; nor can take, have, or retain any clerk,  
 who shall become bound by contract in writing  
 as aforesaid, after such attorney or solicitor shall  
 have discontinued or left off, or during such time  
 as he shall not actually practise as, or carry on  
 the business of an attorney or solicitor<sup>d</sup>. And  
 by a late rule of court, “ no attorney who shall  
 “ be retained or employed as a writer or clerk, by  
 “ any other attorney, shall during the time of such  
 “ employ, take or have any clerk under articles;  
 “ and that no service to any such attorney under  
 “ articles, during the time that such attorney shall  
 “ be so employed by any other attorney, shall be  
 “ deemed good service<sup>e</sup>:” which rule was deter-

<sup>b</sup> 34 Geo. III. c. 14. § 2.      <sup>e</sup> R. T. 31 Geo. III. 4

<sup>c</sup> 2 Geo. II. c. 23. § 15.      T. R. 379.

<sup>d</sup> 22 Geo. II. c. 46. § 7.

mined by the court, to have a retrospective operation; it not being introductive of any new regulation, but confirmatory of an old one<sup>f</sup>. And where articles of clerkship appeared to have been entered into collusively, between an attorney and a person who was and continued to act as a turnkey of the King's Bench prison, for the purpose of securing the business of the prisoners to the attorney, the court ordered them to be cancelled<sup>g</sup>.

With respect to the *service* in general, under articles of clerkship, it is enacted, that "every person who shall become bound by contract in writing to serve any attorney or solicitor, shall during the whole time and term of service to be specified in such contract, continue and be actually employed by such attorney or solicitor, or his or their agent or agents, in the proper business, practice, or employment of an attorney or solicitor<sup>h</sup>." But by the above rule of court, "no person who shall enter into articles with an attorney or attornies, shall be at liberty to serve the *agent* or agents of such attorney or attornies, under such articles, for a longer time than one year of his clerkship; and that any such service to an agent or agents

<sup>f</sup> 4 T. R. 492.

<sup>h</sup> 22 Geo. II. c. 46. § 8.

<sup>g</sup> 1 Bur. 291.

" beyond



"beyond that time, shall not be deemed good  
"service<sup>1</sup>."

"Provided always, that if any such attorney  
"or solicitor, to or with whom any such person  
"shall be so bound, shall happen to *die*, before  
"the expiration of such term, or shall *discon-*  
"*tinue* or leave off such his practice as afore-  
"said, or if such contract shall by mutual  
"consent of the parties be *cancelled*, or in case  
"such clerk shall be legally *discharged* by any  
"rule or order of the court, wherein such attor-  
"ney or solicitor shall practise, before the expi-  
"ration of such term, and such clerk shall in  
"any of the said cases be bound by another  
"contract or other contracts in writing to serve,  
"and shall accordingly serve in manner before-  
"mentioned, as clerk to any other practising  
"attorney or attornies, solicitor or solicitors re-  
"spectively, during the residue of the said term  
"of five years, then such service shall be deemed  
"and taken to be as good, effectual, and avail-  
"able, as if such clerk had continued to serve  
"as a clerk for the said term, to the same person  
"to whom he was originally bound; so as an  
"affidavit be duly made and filed of the execu-  
"tion of such second or other contract or con-

<sup>1</sup> R. T. 31 Geo. III. 4 T. R. 379.

“tracts, within the time, and in like manner,  
 “as is before directed, concerning such original  
 “contract.” And such second contracts are  
 not subject to, or chargeable with any of the  
 duties imposed by the said act of 34 Geo. III.  
 c. 14. § 8.

And to the intent that better information may  
 be obtained, touching the fitness and qualifica-  
 tions of persons applying to be admitted attor-  
 nies, it is ordered, by some late rules of court,  
 that “every person who shall intend to apply  
 “for admission as an attorney in this court, and  
 “who shall not have been admitted an attorney  
 “or solicitor of any other court, shall for the space  
 “of one full term, previous to the term in which  
 “he shall apply to be admitted, cause his name  
 “and place of abode, and also the name or names,  
 “and place or places of abode of the attorney or  
 “attornies to whom he shall have been articled,  
 “written in legible characters, to be affixed on  
 “the outside of the court of King’s Bench, in  
 “such place as public notices are usually affixed  
 “on; and also enter, or cause to be entered, in  
 “a book to be kept for that purpose, at each of  
 “the judges chambers of this court, his name

<sup>1</sup> 22 Geo. II. c. 46. § 9.

<sup>2</sup> R. T. 31 Geo. III. 4 T. R. 379.

"and place of abode, and also the name and  
 "place of abode of the attorney or attornies to  
 "whom he shall have been articled".

And before he can be admitted an attorney or solicitor, every person who shall become bound as a clerk as aforesaid, is required to cause an *affidavit* of himself, or the attorney or solicitor to whom he was bound, to be duly made and filed with the proper officer appointed for that purpose, (being in this court the chief-clerk or his deputy,) that he hath actually and really served, and been employed by such practising attorney or attornies, solicitor or solicitors, to whom he was bound as aforesaid, or his or their agent or agents, during the said whole term of five years, according to the true intent and meaning of the statute 22 Geo. II. c. 46. § 10<sup>n</sup>. An *affidavit* is also required to be made by the person to be admitted, of the payment of the duty imposed by the statute 34 Geo. III. c. 14, in which he shall insert the sum paid in respect thereof, and shall specify the name and place of abode of the person or persons with whom such contract of service was entered into, the time of the execution thereof,

<sup>m</sup> R. T. 33 Geo. III. 5    <sup>n</sup> Append. Chap. XIII.  
 T. R. 368.    [B.]

and the time of enrolling or registering the same: and in case such person shall have been previously admitted a solicitor or attorney in some other court, shall also specify in such affidavit, the court in which he has been so admitted, and the time of his admission therein<sup>o</sup>; and shall cause the same to be duly filed in the court in which he proposes to be so admitted a solicitor or attorney, with the proper officer appointed for receiving and filing such affidavits; and every such affidavit shall be produced, and openly read in the court in which such person shall be admitted a solicitor or attorney, before he shall be enrolled or registered therein<sup>p</sup>.

The *oath* (or *affirmation*, if by a *quaker*) required to be taken by an attorney before admittance, is that he will truly and honestly demean himself, in the practice of an attorney, according to the best of his knowledge and ability<sup>q</sup>; besides which, he is to take the oaths of allegiance and supremacy, and to subscribe the declaration against popery<sup>r</sup>. But the judges of the court, or one or more of them, before they admit any person to take the said oath or affirmation, are

<sup>o</sup> Append. Chap. XIII. 12 Geo. II. c. 13. § 8.

[C.] <sup>r</sup> 7 & 8 W. III. c. 24.

<sup>p</sup> 34 Geo. III. c. 14. § 3. 13 W. III. c. 6. § 3.

<sup>q</sup> 2 Geo. II. c. 23. § 13.

to *examine* and inquire, by such ways and means as they shall think proper, touching his fitness and capacity to act as an attorney; and if such judge or judges respectively shall be thereby satisfied, that such person is duly qualified to be admitted to act as an attorney, then and not otherwise, the said judge or judges are to administer in open court to such person, the said oath or affirmation; and after such oath or affirmation, to cause him to be *admitted* an attorney, and his name to be *enrolled* as an attorney in such court, without any fee or reward, other than one shilling for administering the oath or affirmation; which admission shall be written on parchment, in the *English* tongue, in a common legible hand, and signed by such judge or judges respectively, whereon the lawful stamps shall be first impressed, and shall be delivered to the person so admitted'. These stamps at present amount to 8 l. And in this court, the chief-clerk or his deputy is required, without fee or reward, to *enroll* the name of every person who shall be admitted an attorney therein, and the time when admitted, in an alphabetical order, in a roll or book to be provided and kept for that purpose, in the King's Bench office; to which roll or book all persons may have free ac-



cess, without fee or reward'. And of so high an authority is this roll, that if an exemplification of it be annexed to a plea of privilege, the plaintiff must reply *nul tiel record*, and cannot otherwise try the fact of the defendant's being an attorney<sup>u</sup>.

The habitations however, of many attornies, practising in this court, resident in and near the cities of *London* and *Westminster*, being often very difficult to be found; whereby it was impracticable duly to serve them with notices, summonses, orders, and rules, to the great delay of the proceedings in this court; a rule was made in *Hilary* term, 8 Geo. III. that the master should forthwith cause to be prepared a proper alphabetical book, for the purposes after-mentioned; and that the same should be publicly kept at the master's office in the King's Bench Walks, to be there inspected by any attorney or his clerk, without fee or reward; and that every attorney practising in this court, and residing in *London* and *Westminster*, or within ten miles of the same, should, before the first day of the then next term, enter in such book, in alphabetical order, his name and place of abode, or some other proper place within the cities of *London*

<sup>u</sup> 2 Geo. II. c. 23. § 18. 6 Mod. 305. 2 Ld. Raym.

<sup>v</sup> 1 Ld. Raym. 336. 7 1172. 1 Str. 76, 532.  
Mod. 106. 2 Salk. 545.

and *Westminster*, where he might be served with such notices, summonses, orders, and rules: And it is thereby required, "that every attorney afterwards to be admitted, and practising and residing as aforesaid, shall upon his admission make the like entry, and that as often as any such attorney shall change his place of abode, or the place where he may be so served with notices, summonses, orders, and rules, he shall make the like entry thereof in the said book; and that all notices, summonses, orders, and rules, which do not require a personal service, shall be deemed sufficiently served on such attorney, if a copy thereof shall be left at the place lastly entered in such book, with any person resident at or belonging to such place; and if any such attorney shall neglect to make such entry, that then the fixing up of any notice, or the copy of any summons, order, or rule, for such attorney, in the said master's office, shall be deemed a sufficient service, unless the matter be such as shall require a personal service." In conformity to this rule, it is usual for practisers, who live remote from the inns of court or chancery, to add to the place of their abode, the name and place of abode of some other person, where and with whom notices, summonses, orders, rules, and other proceedings that do not

require personal service, may be left for them, near to such inns<sup>v</sup>. But when the name and place of abode of the attorney are entered, then service at that place is the proper service<sup>v</sup>.

The only remaining circumstance necessary for enabling an attorney to practise, is his taking out a *certificate*, pursuant to the statute 25 Geo. III. c. 80.<sup>x</sup> by which it is enacted, that  
 “ every attorney, &c. admitted and enrolled in  
 “ any of his majesty’s courts at *Westminster*, or  
 “ in any other court holding pleas where the  
 “ debt or damage shall amount to 40 s. or more,  
 “ shall previous to his commencing or defend-  
 “ ing any suit or prosecution, take out annually  
 “ a certificate of such his admission and enroll-  
 “ ment: for which, if he shall reside in any of  
 “ the inns of court, or in the cities of *London* or  
 “ *Westminster*, the borough of *Southwark*, the  
 “ parish of *St. Pancras* or *St. Mary le bone*, or  
 “ within the bills of mortality, &c. there shall be  
 “ charged a stamp-duty of *five* pounds; or if  
 “ he shall reside in any other part of *Great Bri-*  
 “ *tain*, there shall be charged a stamp-duty of  
 “ *three* pounds<sup>y</sup>: Which certificate shall be re-  
 “ newed, at least ten days previous to the expir-  
 “ ation of the time for which it was granted,

<sup>v</sup> Imp. K. B. 64, 5.

<sup>w</sup> Lofft, 357.

<sup>x</sup> § 1.

<sup>y</sup> § 5.

“ and

"and so yearly and every year, so long as such attorney, &c. shall continue to practise\*."

"And that every person who shall in his own name, or in the name of any other person or persons, sue out any writ or process, or commence, prosecute, carry on, or defend any action or suit, or any proceedings as an attorney, &c. in any of the courts aforesaid, for or in expectation of any gain, fee, or reward, without having obtained such certificate, in such manner as in the said act is directed, or shall deliver in to the respective officers appointed by that act, any false or fictitious place of residence, with intent to evade the payment of the higher duties by that act imposed, shall for every such offence, forfeit and pay the sum of 50*l.* and be made incapable to maintain or prosecute any action or suit, for the recovery of his fees, &c. in any court of law or equity." This statute has been held not to extend to the *county* court, though an attorney prosecute a suit there, by virtue of a writ of *justicies*, for more than 40*s.*\*

And it is by the same act declared to be lawful, for any person having duly obtained a certificate, in the manner therein directed, to sue out any writ, &c. in the name, and by and with

\* § 7.

§ 2. c. 3. s. 1. 6 T. R. 663.

the consent of any other attorney, &c. in writing first, had and obtained, and signed by him, in like manner as he might have lawfully done before the making of that act; provided that such attorney, &c. in whose name such proceedings shall be instituted, commenced, or carried on, shall also have first duly obtained a certificate, out of the court wherein he is sworn, admitted, and enrolled in manner aforesaid, or in default thereof, every such attorney, &c. shall be subject and liable to the like pains, penalties, forfeitures, and incapacities, as any other attorney, &c. is by that act made subject and liable to<sup>b</sup>. And it is also declared to be lawful, for any person duly sworn, admitted and enrolled an attorney, &c. in any *two* or more of the said courts respectively, under a proper certificate obtained from either of the said courts, in such manner as in the said act is directed, to commence, carry on, prosecute, solicit, or defend any action or suit, or any proceedings, in any of the said other courts, in which he is so sworn, admitted, or enrolled, although such certificate shall or may not have issued from such other court<sup>c</sup>.

A person having been sworn, admitted, and enrolled as an attorney at law, may be sworn,

<sup>b</sup> 25 Geo. III. c. 80. § 8.

<sup>c</sup> § 9.

admitted,



admitted, and enrolled as a solicitor in *equity*<sup>d</sup>, and *vice versa*<sup>e</sup>, without being subject to the payment of the stamp-duty imposed by the statute 34 Geo. III. c. 14.<sup>f</sup> And an attorney in any of his majesty's courts of record at *Westminster*, is capable of being admitted to practise as an attorney in any *inferior* court of record, provided he be in all other respects capable and qualified to be admitted an attorney; according to the usage and custom of such inferior court<sup>g</sup>. It is also declared to be lawful, for any person who shall be sworn, admitted, and enrolled to be an attorney, in any of his majesty's courts of record at *Westminster*, &c. by and with the consent and permission of any attorney, in any of the said other courts of record, &c. such consent being in writing, signed by such attorney, and in the name of such attorney, to sue out any writ or process, or to commence, carry on, prosecute, or defend any action or actions; or any other proceedings in such court, notwithstanding such person is not sworn or admitted to be an attorney of such court<sup>h</sup>. And a demand of costs by the acting attorney is good, although he act in the name of another attorney<sup>i</sup>.

<sup>d</sup> 2 Geo. II. c. 23. § 20.

<sup>e</sup> 22 Geo. II. c. 46. § 15.

<sup>f</sup> § 5, 6, 7.

<sup>g</sup> 6 Geo. II. c. 27. § 2.

<sup>h</sup> 2 Geo. II. c. 23. § 10.

<sup>i</sup> Say. Rep. 95.

But “ if any person, who shall be a sworn attorney of any of the courts of law aforesaid, shall knowingly and willingly permit or suffer any other person or persons to sue out any writ or process, or to commence, prosecute, follow, or defend any action or actions, or other proceedings, in his name, not being a sworn attorney of one of the said other courts of law, or a sworn solicitor of the court of chancery, or other court of equity, and shall be thereof lawfully convicted, every person so convicted shall, from the time of such conviction, be disabled and made incapable to act as an attorney, in any of the courts of law aforesaid; and the admittance of such person to be an attorney of any of the said courts of law, shall from thenceforth cease and be void\*.” And by a subsequent act<sup>1</sup>, “ if any sworn attorney or solicitor shall act, as *agent* for any person or persons not duly qualified to act as an attorney or solicitor, or permit or suffer his name to be any-ways made use of, upon the account, or for the profit of any unqualified per-

\* 2 Geo. II. c. 23. § 10.

<sup>1</sup> 22 Geo. II. c. 46. § 11.

See also the statute 3 Jac. I. c. 7. § 2. and R. M. 1654. § 1. by which rule, attornies dismissed by one court from

their practice, for misdemeanors, are not after certificate to be admitted to practise in another court, it being contrary to the intent of the law.

“ son or persons, or send any process to such un-  
“ qualified person or persons, thereby to enable  
“ him or them to appear, act, or practise in any  
“ respect as an attorney or solicitor, knowing  
“ him not to be duly qualified as aforesaid, and  
“ complaint shall be made thereof in a summary  
“ way, to the court from whence any such pro-  
“ cess did issue, and proof made thereof upon  
“ oath, to the satisfaction of the court, that such  
“ sworn attorney or solicitor hath offended  
“ therein as aforesaid, then every such attorney  
“ or solicitor so offending shall be struck off the  
“ roll, and for ever after disabled from practising  
“ as an attorney or solicitor; and in that case,  
“ and upon such complaint and proof made as  
“ aforesaid, it shall and may be lawful to and for  
“ the said court to commit such unqualified per-  
“ son, so acting and practising as aforesaid, to  
“ the prison of the said court, for any time not  
“ exceeding one year.” But where an attorney’s  
name was set to process, without his authority,  
the court ordered the proceedings to be set aside,  
and granted an attachment against the plaintiff’s  
attorney<sup>m</sup>. So where judgment was entered up  
by an attorney’s clerk, in the name, but without  
the knowledge or consent of a regular attorney,  
it was ordered to be set aside<sup>n</sup>.

<sup>m</sup> 1 Bur. 20.<sup>n</sup> 5 Bur. 266o.

Attornies residing in the country frequently employ *agents* in town, to prosecute and defend suits; and on the other hand, attornies in town sometimes employ agents in the country, to superintend the execution of writs, &c. Where country attornies are concerned as *principals*, declarations, pleas, and other proceedings should not be delivered and carried on in the country, but by the agents in town: And if the agent of the plaintiff's attorney give the agent for the defendant time to plead, the country attorney cannot sign judgment, till that time be expired. Notice of trial must be given in town, but a countermand may be given in the country<sup>o</sup>. Payment to the attorney is payment to the principal<sup>p</sup>; but it is otherwise of payment to an agent, employed by the plaintiff's attorney<sup>q</sup>.

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The principal *duties* of an attorney or agent are care, skill, and integrity. And if he be not deficient in any of these essential requisites, he is not responsible for any error or mistake, aris-

<sup>o</sup> Imp. K. B. 68.

<sup>q</sup> Doug. 623, 4.

<sup>p</sup> 1 Blac. Rep. 8.

ing in the exercise of his profession. To use the words of Lord *Mansfield*, in the case of *Pitt v. Walden*, "that part of the profession which is carried on by attorneys is liberal and reputable, as well as useful to the public, when they conduct themselves with honor and integrity; and they ought to be protected, where they act to the best of their skill and knowledge: but every man is liable to error; and his lordship added, he should be very sorry, that it should be taken for granted, that an attorney is answerable for every error or mistake, and liable to be punished for it, by being charged with the debt sued for. A counsel may mistake, as well as an attorney; yet no one will say, that a counsel who has been mistaken, shall be charged with the debt. The advice of a counsel is indeed honorary, and he does not demand a fee for it: the attorney may demand a compensation; but neither of them ought to be charged with the debt for a mistake. Not only counsel, but judges may differ, or doubt, or take time to consider: therefore an attorney ought not to be liable, in cases of reasonable doubt." But in ordinary cases, if an attorney be deficient in skill or care, by which a loss



arises to his client, he is liable to a special action on the case for damages<sup>1</sup>. It is not usual, however, for the court to interfere in a summary way, on account of negligence or unskilfulness<sup>2</sup>, except it be very gross<sup>3</sup>; or for the misconduct of an attorney, independently of his profession.

Where *writings* come to an attorney's hands, in the way of his business as an attorney, the court on motion will make a rule upon him, to deliver them back to the party<sup>4</sup>, on payment of what is due to him<sup>5</sup>; and particularly, when he has given an undertaking to redeliver them<sup>6</sup>. But where they come to his hands in any other manner, it was formerly held, that the party must resort to his action<sup>7</sup>. In a late case however it was determined, that the court under circumstances will entertain a summary jurisdiction over an attorney, in obliging him to deliver up deeds, &c. on satisfaction of his lien; though they came to his hands as steward of a court, and receiver of rents<sup>8</sup>: And if a third person appear to be interested in the deeds, &c. the court will take a security, from the person to whom

<sup>1</sup> 2 Willf. 325.

<sup>1</sup> Str. 547.

<sup>2</sup> 4 Bur. 2060.

<sup>2</sup> 1 Str. 621. 8 Mod.

<sup>3</sup> Say. Rep. 50, 169.

339. S. C.

<sup>4</sup> 1 Salk. 87.

<sup>4</sup> 1 Salk. 87.

<sup>5</sup> Say. Rep. 125. but see

<sup>5</sup> 3 T. R. 275.

they

they are delivered, to produce them on demand, for the inspection of such third person<sup>a</sup>. The court in some instances, will order an attorney to pay costs to his own client for *neglect*<sup>b</sup>; or to the opposite party, for *vexatious* and improper conduct<sup>c</sup>. And if a rule be made upon an attorney, for the delivery of writings, or payment of costs, &c. and it be not obeyed, the court will enforce it by attachment; which is also the regular mode of proceeding against an attorney, for the non-performance of his undertaking to put in bail<sup>d</sup>, &c.

Where an attorney is charged by affidavit with any fraud or malpractice in his profession, contrary to the obvious rules of justice and common honesty, the court on motion will order him to answer the matters of the affidavit; and in general if he positively deny the malpractices imputed to him, they will dismiss the complaint; but otherwise they will grant an attachment: And in a late case, where an attorney required to answer the matters of an affidavit, swore in his exculpation to an incredible story, the court granted an attachment against him, though he

<sup>a</sup> 3 T. R. 275.

<sup>b</sup> Say. Rep. 50, 172.

<sup>c</sup> 2 Bur. 654.

<sup>d</sup> R. M. 1654. § 10. 6  
Mod. 52, 86. 1 T. R. 422.  
and see Cowp. 845.

S

positively

positively denied the malpractices with which he was charged<sup>a</sup>.

The party being taken on the attachment, either remains in custody, or puts in bail before a judge, (for he is notailable by the sheriff<sup>f</sup>), to answer interrogatories, to be exhibited against him in the crown office<sup>g</sup>; which interrogatories must be signed by counsel<sup>h</sup>; and after being examined thereon by the master, if he be reported in contempt, the court will pass judgment upon him, of fine<sup>i</sup> or imprisonment, according to the circumstances of the case; but if the report be in his favour, they will order him to be discharged, or his recognizance to be vacated<sup>k</sup>. And by a late rule of court<sup>l</sup>, if judgment be not given the same term, the name of the cause shall be inserted in the list of motions, appointed to come on *peremptorily* in the ensuing term.

If an attorney has been fraudulently admitted<sup>m</sup>, or his misconduct has been very gross,

<sup>a</sup> 6 T. R. 701.

5 T. R. 474.

<sup>f</sup> 1 Str. 479.

<sup>i</sup> 1 Will. 22.

<sup>g</sup> 7 Mod. 31. 6 Mod. 43.

<sup>k</sup> 3 Bur. 1257.

<sup>1</sup> Str. 444. 1 Will. 30.

<sup>l</sup> R. H. 34 Geo. III.

<sup>3</sup> Bur. 1257. 4 Bur. 2106,

5 T. R. 547, 723.

2129. 5 T. R. 362.

<sup>m</sup> 2 Blac. Rep. 991.

<sup>h</sup> R. M. 34 Geo. III.

or if he has been convicted of felony <sup>n</sup>, or other offence which renders him unfit to be continued an attorney, the court will order him to be struck off the roll: and if an attorney has been convicted of forgery or perjury, he is liable to be transported <sup>o</sup>. But striking an attorney off the roll is not always understood to be a perpetual disability; for the court have in some instances permitted him to be restored, considering the punishment in the light of a suspension only <sup>p</sup>. An attorney may also be struck off the roll at his own instance, as for the purpose of being called to the bar, &c.: And if he be afterwards desirous of being restored, he must, if called to the bar, first apply to the inn of court where he was called, to be disbarred <sup>q</sup>; and the court will make him consent to take no advantage of his privilege, in any action then depending <sup>r</sup>.

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An attorney is supposed to be always present in court: and on that account, has many *privileges* belonging to him, in common with the

<sup>a</sup> Cowp. 829.

<sup>p</sup> 1 Blac. Rep. 222.

<sup>o</sup> Stat. 12 Geo. I. c. 29.

<sup>q</sup> Doug. 314.

<sup>r</sup> 4.

<sup>r</sup> *Id.* Barnes, 42.

other officers of the court. Where an attorney is *plaintiff*, he is entitled to sue in his own court, by *attachment* of privilege<sup>a</sup>; and may lay the venue in *Middlesex*<sup>t</sup>. Where he is *defendant*, he must be sued in his own court by *bill*<sup>u</sup>, even as acceptor of a bill of exchange<sup>v</sup>; and cannot be arrested or holden to special bail<sup>w</sup>. It is also said, that an attorney is entitled to have his cause tried at bar<sup>x</sup>. And as an attorney is not subject to the jurisdiction of the court of conscience, except where he is expressly made liable thereto, as in *Westminster*<sup>y</sup> and the *Tower Hamlets*<sup>z</sup>, he may in all other cases sue<sup>a</sup>, and be sued<sup>b</sup>, in his own court, for debts under forty shillings. An attorney is also, by reason of the supposed necessity of his attendance in court, exempt from all offices that require *personal* service, as *sheriff*<sup>c</sup>, *constable*<sup>d</sup>, *overseer of the poor*<sup>e</sup>, &c.: and formerly, he was not liable to

<sup>a</sup> Gilb. C. P. 3.<sup>t</sup> 2 Salk. 668. 4 Bur. 2027.

<sup>3</sup> T. R. 573. But an attorney *defendant* has not the privilege of changing the venue into *Middlesex*, when it is laid in another county. *Id. per Cur.* H. 24 Geo. III. 2 Str. 1049. *contra.*

<sup>u</sup> 3 Blac. Com. 289.<sup>v</sup> Doug. 312.<sup>w</sup> 1 Mod. 10.<sup>x</sup> 6 Mod. 123.

<sup>y</sup> 24 Geo. II. c. 42. § 1. Doug. 381.

<sup>z</sup> 19 Geo. III. c. 68. § 24.<sup>a</sup> Doug. 382. *in notis.*<sup>b</sup> 2 Will. 42. Doug. 381.<sup>3</sup> Bur. 1583. *contra.*<sup>c</sup> 4 Bur. 2109.<sup>d</sup> Doug. 538.<sup>e</sup> 2 Blac. Rep. 1126.

serve



serve in the *militia*<sup>†</sup>; but several acts of parliament that have been passed in the course of the present reign, having allowed personal service in the *militia* to be commuted for a certain sum of money, to be laid out in providing a substitute, it has been holden that this exemption no longer exists<sup>‡</sup>.

These privileges are allowed, not so much for the benefit of attornies, as of their clients<sup>§</sup>; and are therefore confined to attornies who practise<sup>¶</sup>, or at least have practised within a year<sup>‡</sup>; for it is a rule, that such attornies as have not been attending their employment in this court for the space of a year, unless hindered by sickness, be not allowed their privilege of attornies<sup>¶</sup>: And an attorney, not having practised for some time previous to the issuing of the plaintiff's writ against him, is not privileged from being arrested thereon, and held to bail, on the ground of having recommenced his practice, and taken out his certificate, before

<sup>†</sup> Barnes, 42. Andr. 355. 2 Lutw. 1667. *contra*.

<sup>‡</sup> Str. 1143.

<sup>§</sup> Ridley and Carr, E.

<sup>¶</sup> Gerard's Case, 2 Blac.

1656. 1 Lil. P. R. 142.

Rep. 1123.

Chippendale's Case, E. 19 Geo.

<sup>h</sup> 2 Willf. 44. 4 Bur. 2113.

III. Sand v. Heysham, H. 24

Doug. 381.

Geo. III.

<sup>i</sup> 2 Willf. 232. 4 Bur.

<sup>1</sup> R. M. 1654. § 1.

2115. 2 Blac. Rep. 1086.

he was actually arrested<sup>m</sup>. Where the plaintiff and defendant are attorneys of *different* courts, the plaintiff is allowed his privilege of suing the defendant by attachment<sup>n</sup>: and in this case it is commonly said, that there is no privilege against privilege; or in other words, the privilege of the plaintiff takes away that of the defendant; for the attendance of the plaintiff is as necessary in his court, as that of the defendant in his, and therefore the cause is legally attached in the court where the plaintiff is an officer<sup>o</sup>. But where the plaintiff and defendant are both attorneys of the *same* court, the defendant is entitled to his privilege, of being sued by *bill*<sup>p</sup>; and if not so sued, he may plead his privilege in abatement, or the court on motion will set aside the proceedings, but without costs<sup>q</sup>.

An attorney may also *waive* his privilege, either when plaintiff, by suing as a common person<sup>r</sup>; or when defendant, by not claiming

<sup>m</sup> 7 T. R. 25.

<sup>p</sup> 2 Str. 1141. 1 Blac.

<sup>n</sup> 2 Brownl. 266. 2 Str. Rep. 19. 2 Blac. Rep. 1085.

837. 1 Barnard, K. B. 182, 6 T. R. 524.

228. S. C. 1 Blac. Rep. 19. <sup>q</sup> 6 T. R. 524. Barnes,

Barnes, 44. 2 Blac. Rep. 53.

1325.

<sup>r</sup> 2 Str. 837. 1 Barnard,

<sup>s</sup> 4 Bac. Abr. 227.

223. S. C.

it in due time, or in a proper manner'. And where an attorney of the Common Pleas is in the actual custody of the marshal, he may be sued in this court as a prisoner, by *third* persons. But where an attorney of the Common Pleas puts in bail, to an action depending in this court, he does not thereby lose his privilege; but may plead it in that action, or in any other brought against him by the *bye*; for it would be absurd, that he who founds his action on that of another, should be in a better condition than the original plaintiff'. Yet where an attorney, after having put in bail, waives his privilege, by pleading in *chief*, in one action, it is construed to be a waiver of privilege, in all other actions brought against him by the *bye*, during the same term'. It is likewise settled, that an attorney shall not be allowed his privilege as against the king<sup>u</sup>, or where he sues or is sued *en auter droit*, as executor or administrator<sup>v</sup>; or jointly with his wife<sup>w</sup>,

<sup>\*</sup> 2 Blac. Rep. 1088.

Raym. 275. 1 Lutw. 196.

<sup>t</sup> 27 Hen. VI. 6. a. 31 3 Lev. 398. S. C. 1 Salk.  
Hen. VI. 10. Carth. 377. 30. 2 Salk. 543. 3 Salk.  
1 Salk. 1, 2. 1 Ld. Raym. 282. Comb. 318. 12 Mod.  
135. S. C. 12 Mod. 102, 74. S. C. 1 Blac. Rep. 373.  
112, 535. 1 Str. 191. Cowp. 367. Barnes, 48.

<sup>u</sup> 1 Ld. Raym. 27. But ac- <sup>v</sup> Hob. 177. 1 Salk. 2.  
tions *qui tam* are not consider- 1 Ld. Raym. 533. S. C.  
ed as the king's actions. T. <sup>w</sup> Bro. Abr. tit. *Bill*, pl. 2.

or other person who is not privileged<sup>2</sup>; or where there would otherwise be a failure or defect of justice, as where an *appeal* is brought in this court, a *real* action in the Common Pleas, or an *attachment* in the sheriff's court of *London*, against an attorney of a different court<sup>7</sup>.

As an attorney is entitled to many privileges, so he is subject to some *disabilities* and restrictions. By statute 1 Hen. V. c. 4. "no under-sheriff, sheriff's clerk, receiver, or sheriff's bailiff, shall be attorney in the king's courts, during the time that he is in office." And by the statute 22 Geo. II. c. 46. § 14. "no clerk of the peace or his deputy, nor any under-sheriff or his deputy, shall act as a solicitor, attorney, or agent, or sue out any process at any general or quarter sessions of the peace, to be held for any place where he shall execute his office, upon pain of forfeiting fifty pounds." By rule of Mich. 1654. § 1. "no attorney can be lessee in ejectment; or bail for a defendant, in any action depending in this court<sup>2</sup>." By statute 5 Geo. II. c. 18. § 2. "no attorney or solicitor shall be capable to continue or be a justice of the peace in England or Wales, during

<sup>2</sup> 2 Rol. Abr. 274. 2 Salk. in 4 Bac. Abr. 223.

544. 12 Mod. 163. 4. Pratt 7 1 Saund. 67.

v. Sale, H. 8 Geo. II. cited = See also Doug. 466.

“such time as he shall continue in the business  
 “or practice of an attorney or solicitor.” By  
 other acts of parliament<sup>a</sup>, “no attorney or soli-  
 “citor, or person practising as such, can be a  
 “*commissioner of the land-tax*, without possessing  
 “one hundred pounds a-year.” And it is usual to  
 except attornies, who have embezzled their clients  
 money, out of the *insolvent debtors acts*.

Lastly, by the statute 12 Geo. II. c. 13.<sup>b</sup> “no  
 “attorney or solicitor, who shall be a *prisoner* in  
 “any gaol or prison, or within the limits, rules,  
 “or liberties thereof, shall during his confine-  
 “ment, in his own name, or in the name of any  
 “other attorney or solicitor, sue out any writ or  
 “process, or *commence* or *prosecute* any action or  
 “suit, in any courts of law or equity; and all  
 “proceedings in such actions or suits shall be  
 “void and of none effect: And such attorney  
 “or solicitor, so commencing or prosecuting any  
 “action or suit as aforesaid, shall be struck off  
 “the roll, and incapacitated from acting as an  
 “attorney or solicitor for the future: And any  
 “attorney or solicitor, permitting or empower-  
 “ing any such attorney or solicitor as aforesaid,  
 “to commence or prosecute any action or suit  
 “in his name, shall be punished in like manner.

<sup>a</sup> See the statute 30 Geo. II. c. 3. § 87. &c.  
<sup>b</sup> § 9.

“ Provided



“ Provided nevertheless, that nothing in the said  
 “ act contained, shall extend, or be construed to  
 “ extend, to prevent any attorney or solicitor so  
 “ confined as aforesaid, from carrying on or  
 “ transacting any suit or suits, *commenced* before  
 “ the confinement of such attorney or solicitor as  
 “ aforesaid.” This statute has been held to re-  
 late only to the *prosecuting*, and not to the *de-*  
*fending* of suits<sup>a</sup>: And where, after an action  
 commenced by an attorney, he became a pri-  
 soner, and then the bail-bond was assigned, and  
 he being still a prisoner, commenced an action  
 on the bail-bond, this was held to be a continu-  
 ance of the original suit, commenced before the  
 attorney became a prisoner<sup>c</sup>.

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Attornies, we have seen, are to sue by *attach-*  
*ment* of privilege, and to be sued by *bill*. The  
*attachment* of privilege, at the suit of an attor-  
 ney, is in nature of a *latitat*<sup>f</sup>: therefore in re-  
 plying it to a plea of the statute of limitations,  
 the plaintiff must set forth the continuances<sup>g</sup>.  
 And an attachment of privilege is not a continu-

<sup>a</sup> § 10.

<sup>d</sup> Barnes, 263.

<sup>e</sup> *Id.* 46.

<sup>f</sup> 1 Show. 367. and see S. C. But see 1 Will. 167.

Append. Chap. XIII. [D.]

<sup>g</sup> *Ante*, 25. Carth. 144.

1 Show. 366. 2 Salk. 420.

ance of a bill of Middlesex, so as to avoid the statute of limitations<sup>b</sup>. In suing it out, the rule is, that "every attorney shall leave a *præcipe* " with the signer of the writs, containing the defendants' names, not exceeding four in each " writ, with the return, and day of signing such " writ, and the agent's or attorney's name who " sued out the same: and that all such *præcipes* " shall be entered on the roll, where the *præcipes* " of *latitats*, and all other writs issuing out of " this court, are entered; and the officer, that " signs the writs in this court, shall not sign such " attachment, till a *præcipe* be left with him for " that purpose<sup>c</sup>." But when an attorney sues by attachment of privilege, his name need not be indorsed on the writ; for the 2 Geo. II. c. 23. § 22. which requires the name of the plaintiff's attorney to be indorsed on the writ, only extends to cases where the attorney sues for another person<sup>d</sup>: And an attorney plaintiff may sue by common process, and indorse his own name on the copy, as the attorney, and may afterwards declare by another attorney<sup>e</sup>. If an attorney sue by attachment of privilege, for words spoken in *Wales*, and the venue be laid there, and the plaintiff do not recover a verdict for ten pounds, it may be suggested on the roll, that the defend-

<sup>b</sup> 3 T. R. 662.<sup>c</sup> R. H. 20 Geo. II.<sup>d</sup> 4 T. R. 275.<sup>e</sup> 7 T. R. 35.

ant was resident in *Wales*, &c. in order to entitle the defendant to enter a nonsuit, under the statute 13 Geo. III. c. 51. : But if the venue had been laid in *Middlesex*, it might have made a difference<sup>m</sup>.

An attorney was formerly permitted to hold the defendant to special bail, upon an attachment of privilege, for fees or disbursements, however trifling<sup>n</sup>. But now, since the statutes for preventing frivolous and vexatious arrests, the defendant cannot be arrested and holden to special bail, upon an attachment of privilege, or any other process, unless the cause of action amount to ten pounds or upwards : Where it is under that amount, the defendant must be served with a copy of the process, and notice to appear, as in other cases. The time allowed for declaring upon an attachment of privilege, is the same as upon a *latitat*, or other process in trespass. And if an attorney sue out an attachment of privilege, and deliver or file his declaration, and give notice thereof, four days exclusive before the end of the term wherein the attachment is returnable, the defendant must plead as of that term; the plaintiff having entered a rule to plead, and demanded a plea : but if he do not declare within

<sup>m</sup> 6 T. R. 500.

K. B. 246. Gilb. C. P. 36.

<sup>n</sup> R. M. 1654. § 9. Gilb.

that time, the defendant may imparl to the next term; and if he do not declare before the effoin-day, the defendant will have an imparlance to the term following<sup>o</sup>.

The *bill* against an attorney is a complaint in writing, describing the defendant as *being present in court*<sup>p</sup>; and generally concludes with a *prayer of relief*, though the declaration upon the bill is not demurrable for want of it<sup>q</sup>. Formerly, the bill against an attorney could only have been filed in term-time, *sedente curia*, and not in vacation<sup>r</sup>: But now it may be filed in vacation, as well as in term-time<sup>s</sup>; and where the cause of action arises after term, there should be a special *memorandum*, stating the day of bringing the bill into the office of the clerk of the declarations<sup>t</sup>.

In practice, it is usual to file the bill, on treble-penny stamped parchment, with the clerk of the declarations, in the King's Bench office; and to deliver a copy of it, on treble-penny stamped paper, to the defendant, with notice thereon to plead in four days<sup>u</sup>; which notice has been deemed sufficient, though he reside more than

<sup>o</sup> R. M. 5 Ann. 3. a. Gilb. K. B. 346.

<sup>p</sup> 1 Saund. 28, 202. 2 Saund. 415. and see Append. Chap. XIII. [E.]

<sup>q</sup> Andr. 247.

<sup>r</sup> 2 Salk. 544. 12 Mod. 163. Gilb. K. B. 346.

<sup>s</sup> Doug. 313. 5 T. R. 173.

<sup>t</sup> 5 T. R. 325.

<sup>u</sup> Imp. K. B. 410.

twenty miles from *London*°. And if the bill be filed, and a copy thereof delivered, four days exclusive before the end of the term, including Sunday, the defendant must plead as of that term; the plaintiff having entered a rule to plead, and demanded a plea: but if the bill be not filed, and copy delivered, within that time, the defendant is entitled to an imparlance°. The rest of the proceedings, by and against attornies, are the same as in other cases; only that they are not bound to pay for copies of the pleadings².

° 5 T. R. 369.

Gilb. K. B. 346.

° R. M. 5 Ann. 3. a.

° Say. Rep. 77.



## C H A P. XIV.

*Of the ORIGINAL WRIT; and PROCESS  
thereon, to the exigi facias.*

**A**N *original writ* is a mandatory letter from the king in chancery, sealed with his great seal<sup>a</sup>; and may be the means of commencing all personal actions, against every person not being an attorney or officer of the court, or a prisoner in the actual custody of the marshal.

Formerly, indeed, it was not usual to proceed in the King's Bench by original writ, in *debt*, *detinue*, or other action of a mere civil nature<sup>b</sup>. But the modern practice is different<sup>c</sup>; and in a late case, where the defendant pleaded to the jurisdiction, in an action of *debt* commenced by original writ, the court gave judgment on demurrer for the plaintiff; and declared, that if such a plea should come before them again, they would inquire by whom it was signed. On the other hand, an original writ seems to have been formerly the only way of proceeding against *peers* and *members* of the house of commons<sup>d</sup>: as it is

<sup>a</sup> Finch, L. 237. 3 Blac. Com. 273.

<sup>c</sup> Cas. temp. Hardw. 317.

<sup>d</sup> Trye, 9, 13. Lil. Ent.

<sup>b</sup> 4 Inst. 76. Trye, 55, 21. 2 H. Blac. 267, 299. 77. 3 Blac. Com. 42.

Still,

still, against a *corporation*, or *hundredors*, on the statutes of hue and cry, &c. <sup>c</sup>; or where, by reason of the defendant's being abroad, or keeping out of the way, he cannot be arrested or served with process.

Another benefit attending this mode of proceeding is, that after judgment in an action by original, a writ of error will not lie in the exchequer-chamber, where it is often brought for the mere purpose of delay, but only in parliament <sup>f</sup>. The reason is, that at common law, no writ of error lay, except in parliament, from the judgment of this court; and the statute <sup>g</sup> which gave a writ of error in the exchequer-chamber, only extends to such actions as are *first* commenced in the King's Bench: therefore, though a writ of error will lie in the exchequer-chamber, on a judgment by *bill*, which originates in the King's Bench, yet it is otherwise where the judgment is upon an *original* writ, which issues out of chancery, where the action in that case is first commenced <sup>h</sup>. But in order to save the great and unnecessary expence of suing forth *special* writs, in small and trifling suits, it is enacted <sup>i</sup>, that "no special writ or process shall be issued out of any superior court, where

<sup>c</sup> Trye, 11.

<sup>f</sup> 1 Sid. 424. Trye, 6.

<sup>g</sup> 27 Eliz. c. 8.

<sup>h</sup> Run. Ej. Gilb K. B. 319.

<sup>i</sup> Stat. 5 Geo. II. c. 27.

§ 5. 3 Bur. 1484.

" the

"the cause of action shall not amount to the sum  
 "of ten pounds or upwards." And by a late  
 rule<sup>k</sup>, "in all actions in which the plaintiff shall  
 "proceed against the defendant by special ori-  
 "ginal writ, and shall recover less than the sum  
 "of fifty pounds, he shall not, on taxing costs,  
 "be allowed any more or other costs, than he  
 "would have been entitled to, in case he had  
 "proceeded by bill; except in such actions, in  
 "which he could not proceed by bill, or in  
 "which any defendant shall be actually out-  
 "lawed."

Original writs are calculated for the *commence-  
 ment* or *removal* of actions<sup>l</sup>. And they are  
 either *de cursu*, or *magistralia*<sup>m</sup>: the former were  
 framed in the king's court, before the division of  
 it, by *magna charta*<sup>n</sup>, and are to be found in the  
*register* of original writs<sup>o</sup>; the latter were made  
 out by the *masters* in chancery, pursuant to the  
 statute of Westm. 2. (13 Edw. I.) c. 24. by  
 which it is enacted, that "whenever it shall hap-  
 "pen in Chancery, that in one case a writ is  
 "found, and not in a similar case, falling under

<sup>k</sup> R. M. 23 Geo. III.

48, 9.

<sup>l</sup> Trye, 1, 12, 93.

<sup>m</sup> c. 11.

<sup>n</sup> Gilb. K. B. 312. 1 Inst.

<sup>o</sup> 1 Inst. 16. b. 73. b.

54. b. 73. b. 2 Inst. 407.

Gilb. C. P. 4, 5. 3 Blac.

670. 7 Co. 4. a. 8 Co.

Com. 183.

" the same law, and requiring the like remedy,  
 " the clerks of the Chancery shall agree in mak-  
 " ing a writ, or refer the plaintiffs to the next  
 " parliament."

In actions of *covenant*, *debt*, and *detinue*, the original writ is called a *præcipe*<sup>r</sup>; by which the defendant has an *option* given him, either to do what he is required, or shew cause to the contrary: but in *assumpsit*, and actions for wrongs, it is called a *pone*, or *si te feceris securum*<sup>s</sup>; by which the defendant is *peremptorily* required to shew cause, in the first instance. In point of form, the original writ is special or general, *nominatum vel innominatum*<sup>t</sup>: The former contains the time, place, and other circumstances of the demand, very particularly; the latter, only a general complaint, without expressing the particulars, as the writ of trespass *quare clausum frigit*, &c.

The original writ is issued by the *curfitor*, who is so called from the writs *de cursu*; and where no *capias* lies, as against peers or members of the house of commons, or against corporations, or hundredors on the statutes of hue and cry, &c. it is necessarily the first proceeding in the cause.

<sup>r</sup> Append. Chap. XIV. L. 257.

[A.]

<sup>v</sup> 1 Bac. Abr. 29. Gilb.

<sup>s</sup> *Id.* [B.] and see Finch, C. P. 3.

And where a *capias* lies, but the defendant absconds, or keeps out of the way, so that he cannot be arrested, or served with process against his person, it is usual to sue out an original writ, as a foundation of process against his goods, or in order to proceed to *outlawry*. But in all other cases, the practice is for the plaintiff's attorney to make out a *præcipe* for an original writ, and deliver it to the *filazer*, who thereupon issues the *capias* in the first instance, keeping the *præcipe* as instructions for the original, which is not in fact issued, unless it become necessary, in consequence of a writ of error upon a judgment by default. On suing out the original writ or *capias*, where the plaintiff's demand exceeds forty pounds, a fine is payable to the king, by way of composition for the liberty of suing in his court\*; which fine is estimated according to the amount of the demand, being six shillings and eight-pence for every hundred marks, or ten shillings for every hundred pounds†.

The original writ should be *directed* to the sheriff, or sheriffs of the county where the action is brought, and intended to be tried; and it should be *teste'd* or witnessed in the king's name at *Westminster*, or wherever else the Chancery is

\* *Gilb. C. P.* 7.† *Trye*, 58, 9.



holden<sup>u</sup>; and as that court is supposed to be always open, it may be teste'd in vacation, as well as in term-time<sup>v</sup>. It should, however, be always teste'd after the cause of action accrued<sup>w</sup>; and should be made returnable on a general return day in term time, *ubicunque*, or *wheresoever* the king shall then be in England<sup>x</sup>. In proceeding to outlawry, if the instructions be carried to the curfitor within the first week of a term, and the cause of action will admit of it, he will, for the sake of expedition, make the original returnable on the first or any other return of the preceding term<sup>y</sup>. Otherwise, it is usually made returnable in the same or the next term; or, as it does not affect the liberty of the defendant, it may be made returnable at the distance of two or three terms<sup>z</sup>. But there should be *fifteen* days, at least, between the *teste* and return of an original<sup>a</sup>; the law requiring that distance of time between the *service* and return of it; though if there be less, it will be aided by the defendant's appearing and pleading in chief<sup>b</sup>.

<sup>u</sup> Finch, L. 237. 3 Blac. Com. 274.

<sup>v</sup> Trye, 59, 60. Sty. Rep. 402. 3 Keb. 214.

<sup>w</sup> 2 Bur. 967.

<sup>x</sup> Trye, 2. <sup>y</sup> *Id.* 60.

<sup>z</sup> Dyer, 175.

<sup>a</sup> 2 Inst. 567. Booth on real Actions, 5. Gilb. C. P. 9.

<sup>b</sup> 3 Blac. Com. 275.

<sup>c</sup> 1 Salk. 63. 1 Ld. Raym. 671. S. C.

The first *process*, or proceeding upon the original writ, in actions of *account*, *annuity*, *covenant*, *debt*, and *detinue*, is a *summons*<sup>c</sup>, or warning to appear according to the exigency of the writ; being nothing more than a copy of the writ itself, made out by the plaintiff's attorney for the sheriff, and delivered by one of his officers to the defendant, or left at the usual place of his abode.

The defendant being summoned, was formerly allowed to cast an *essoin*<sup>d</sup>, or send an excuse by his servant for not appearing; and that being done, it was the plaintiff's duty to adjourn it to some day, appointed by the court, in the next term<sup>e</sup>; if he did not, he was liable to be *non-pros'd*<sup>f</sup>. But no *essoin* was ever allowed in *personal* actions, on the return of a *capias*<sup>g</sup>; nor even on a *summons*, where the defendant was seen in court, or appeared by attorney<sup>h</sup>: and as a corporation aggregate could not appear in any other manner, they were not entitled to an *essoin*<sup>h</sup>. At this day, the defendant being in general at liberty to appear by attorney, no *essoin* is allowed in any *personal* action whatsoever, even where a peer or

<sup>c</sup> Finch, L. 305, 352.

<sup>f</sup> 2 Str. 1194.

<sup>d</sup> 2 Inst. 125. b. 137.

<sup>g</sup> 2 Willf. 165.

<sup>e</sup> Cro. Eliz. 367. Gilb. C. P. 13.

<sup>h</sup> Bro. Abr. tit. *Corporation*, 28. Cas. Pr. C. P. 8.

member of parliament is defendant<sup>1</sup>. Where an essoin is cast, and neither quashed nor adjourned to a particular day, the plaintiff may declare the first day of the next term, and the defendant is not entitled to an imparlance<sup>2</sup>.

If the defendant appear, on or before the *quarto die post* of the return of the original, he should cause an appearance to be entered with the *filazer*, who is so called from the *files* of the *custos brevium*, which are warrants for him to continue the process<sup>3</sup>. If he make default, and the sheriff return that he is summoned, the filazer issues an *attachment*<sup>4</sup>; which is a judicial writ, commanding the sheriff to put the defendant by gages and safe pledges; that is, to take certain of his goods, which are forfeited if he do not appear, or to make him find personal pledges or sureties, who shall be amerced in case of his non-appearance<sup>5</sup>: And this is the first and immediate proceeding upon the original in trespass *vi et armis*<sup>6</sup>, &c. where the violence of the wrong requires a more speedy remedy, and therefore the original writ commands the defendant to be at once attached, without any previous warning. Upon this process, it seems that the

<sup>1</sup> 2 T. R. 16.

<sup>2</sup> *Id. ibid.*

<sup>3</sup> Gilb. C. P. 14. Trye, 280.

*in pref.*

<sup>4</sup> Append. Chap. XIV. [C.]

<sup>5</sup> Gilb. Distr. 18, &c.

Run. Ej. 138. 3 Blac. Com.

<sup>6</sup> Finch, L. 355.

sheriff

sheriff may either *summon* the defendant, or take gages for his appearance at the return of it<sup>p</sup>. But a sheriff's officer cannot justify entering the defendant's house, under an original writ of trespass *quare clausum fregit*, and continuing there, till the defendant paid him a sum of money, as and by way of surety for his appearance<sup>q</sup>.

The sheriff's return to the attachment is either that he has attached the defendant, or that he has nothing by which he can be attached<sup>r</sup>. If the defendant, being attached, still neglect to appear, the plaintiff may proceed, to compel his appearance, by *distringas*<sup>s</sup>, or distress infinite; which is a process commanding the sheriff to distrain the defendant, by all his lands and chattels, and to answer for the *issues*<sup>t</sup>, or profits of the same. Upon the first *distringas*, the sheriff usually returns issues to the amount of forty shillings; and if the defendant do not appear, before or on the *quarto die post* of the return, the plaintiff should sue out an *alias distringas*, and thereupon move the court to increase the issues; a proceeding that seems to have come

<sup>p</sup> Bro. Abr. tit. *Attach-* - <sup>r</sup> Append. Chap. XIV.  
*ment*, pl. 9. and see Dalt. [E.]

Sher. ch. 32. p. 154, &c.

<sup>s</sup> Finch, L. 352. Stat.

<sup>q</sup> 6 T. R. 137.

*Westm.* 2. c. 39. 2 Inst. 453.

<sup>t</sup> Append. Chap. XIV. 5 Mod. 117.

[D.]

in lieu of the writ of averment". In general, if the debt be small, the court will order issues to be returned at once to the amount of it: but otherwise, on the defendant's non-appearance, the plaintiff should sue out a *pluries distringas*, and move the court a second time, and so *toties quoties*, until issues be returned to the amount of the debt. When that is done, the plaintiff should apply to the court, for a sale of the issues, under the statute 10 Geo. III. c. 50. which enacts, that "the court out of which the writ proceeds, may order the issues, levied from time to time, to be sold, and the money arising thereby to be applied, to pay such costs to the plaintiff, as the said court shall think just, under all the circumstances, to order; and the surplus to be retained, until the defendant shall have appeared, or other purpose of the writ be answered:" which statute has been construed to extend to all writs of *distringas*, and not to be confined to such as concern privilege of parliament only. But if the defendant be called in the writ by a wrong name, the sheriff will not be justified in taking his goods under it".

The method of proceeding, by summons, attachment, and distress infinite, is not affected by

<sup>u</sup> *Thef. Brev.* 144, 5.

<sup>w</sup> 6 T. R. 234.

<sup>v</sup> 5 Bur. 2726, 7.



the statutes for preventing frivolous and vexatious arrests<sup>x</sup>, which only relate to process against the *person*. It may therefore still be used to advantage, where the defendant has *property*, but cannot be arrested or served with process: and as no *capias* lies, it is the *only* method of proceeding against *corporations*<sup>y</sup>, and *hundredors* on the statutes of hue and cry<sup>z</sup>, &c.

In proceeding against a *corporation*, the process should be served on the mayor, or other head officer<sup>a</sup>; and if the defendants do not appear, before or on the *quarto die post* of the return of the original, by an attorney appointed under their common seal, (for they cannot appear in person<sup>b</sup>;) the next process is a *distringas*, which should go against them in their public capacity<sup>c</sup>: and under this process, the sheriff may distrain the lands and goods, which constitute the common stock of the corporation<sup>d</sup>. If they have neither lands nor goods, there is no way to compel them to appear, at law or in equity<sup>e</sup>, but only in parliament<sup>f</sup>: for it is a rule, that for a public

<sup>x</sup> 12 Geo. I. c. 29. 5 Geo.

II. c. 27. Barnes, 407, 8, 9.

<sup>y</sup> Com. Dig. tit. *Pleader*,

2 B. 2. 6 Mod. 183.

<sup>z</sup> 3 Keb. 126.

<sup>a</sup> Sty. Rep. 367. Prec. in Chan. 131. 1 Chan. Caf.

206.

<sup>b</sup> *Ante*, 111.

<sup>c</sup> 1 Vent. 351.

<sup>d</sup> Skin. 27.

<sup>e</sup> *Id.* 1 Vern. 122. Skin.

84. S. C. 2 Vern. 395.

Prec. in Chan. 129. S. C.

<sup>f</sup> 1 Chan. Caf. 204.

concern,

concern, the sheriff cannot distrain any private person, who is a member of the corporation<sup>a</sup>.

The principal statutes, by which *hundredors* are made answerable for damages, are first, the statutes of *Hue and Cry*, 13 Edw. I. ft. 2. c. 1, 2. 28 Edw. III. c. 11. and 27 Eliz. c. 13; secondly, the *Riot* act, 1 Geo. I. ft. 2. c. 5.; and thirdly, the *Black* act, 9 Geo. I. c. 22. In proceeding against *hundredors*, on the statutes of hue and cry, it seems that the process might have been formerly served on any inhabitant of the hundred. But now by statute<sup>b</sup>, “no process for  
“*appearance*, in any action to be brought upon  
“the statutes of hue and cry, or either of them,  
“against any hundred, shall be served on any in-  
“habitant thereof, save only upon the high-con-  
“stable or high-constables of the hundred,  
“wherein the robbery shall happen; who is and  
“are required to cause public notice thereof to  
“be given, in one of the principal market-towns  
“within such hundred, on the next market-day  
“after he or they shall be served with such pro-  
“cesses; or if there shall happen to be no market-  
“town within the hundred, then in some parish  
“church within the same hundred, immediately  
“after divine service, on the Sunday next after

<sup>a</sup> Bro. Abr. tit. *Trespass*, see 1 Lev. 237. Finch Rep. 135. 1 Vent. 351. Cowp. 83, 4. S. C.  
<sup>b</sup> 85. Styles, 367. *contra*; and <sup>c</sup> 8 Geo. II. c. 16. § 4.

" his or their being served with such process:  
 " and he or they is and are impowered and re-  
 " quired to enter, or cause to be entered, an ap-  
 " pearance in the said action, and also defend the  
 " same, for and on behalf of the inhabitants of  
 " the said hundred, as he or they shall be ad-  
 " vised."

" And in case the plaintiff or plaintiffs in  
 " such action shall recover and obtain judgment  
 " therein, that then no process of *execution* shall  
 " be served on any particular inhabitant or inha-  
 " bitants of the said hundred, or any franchise  
 " within the precinct thereof, nor on the said  
 " high constable or high constables; but the  
 " sheriff or his officer shall, upon the receipt of  
 " any writ or writs of execution to him directed,  
 " in pursuance of the said judgment, instead of  
 " serving the said writ or writs on any inhabit-  
 " ant or inhabitants, cause the same to be pro-  
 " duced and shewn *gratis* unto two justices of  
 " the peace, of the county, riding, or division,  
 " (whereof one to be of the *quorum*,) and resid-  
 " ing within the said hundred, or near unto the  
 " same; who shall thereupon, with all convenient  
 " speed, cause such taxation and assessment to be  
 " made, and to be levied and collected, in such  
 " manner as is prescribed in and by the statute  
 " made in the 27th year of the reign of Queen  
 " Elizabeth;

“ *Elizabeth*; in which taxation and assessment  
 “ there shall be provided for and included, over  
 “ and above what the costs and damages reco-  
 “ vered by the plaintiff or plaintiffs in such ac-  
 “ tion shall amount to, all such just and neces-  
 “ sary expences, as any high-constable or high-  
 “ constables of any hundred hath or have been  
 “ at, in having defended any such action as afore-  
 “ said, claim being made thereto, and an account  
 “ thereof given in and proved in manner therein  
 “ mentioned; and the sums of money so to be  
 “ levied and collected, shall be paid over and  
 “ delivered, by such officer or officers, as by the  
 “ said statute of Queen *Elizabeth* are to levy and  
 “ collect the same, within *ten* days after such  
 “ collection, to the sheriff of the county wherein  
 “ the robbery shall happen, to the use and be-  
 “ half of the parties respectively entitled to re-  
 “ ceive the same.”

By the *riot* act<sup>1</sup>, the action is to be brought  
 against any *two* or more of the inhabitants of the  
 hundred, in which the damage was done; and  
 upon this act, it does not seem to be necessary  
 to proceed by original writ. But upon the  
*black* act<sup>\*</sup>, the action is to be brought against  
 the inhabitants of the hundred, in like manner as  
 upon the statutes of hue and cry. And the *exe-*

<sup>1</sup> 1 Geo. I. st. 2. c. 5. § 6.      <sup>\*</sup> 9 Geo. I. c. 22.

*execution* upon these acts is regulated by the statute  
 22 Geo. II. c. 46. § 34. by which it is enacted,  
 that "no writ of execution, to be sued out  
 "against the inhabitants of any hundred, on any  
 "judgment obtained by virtue of any act or acts  
 "of parliament whatsoever, shall be levied on  
 "any particular inhabitant or inhabitants of such  
 "hundred; but the sheriff or sheriffs shall, on  
 "receipt of every such writ, cause the same to  
 "be produced to two justices of the peace, in  
 "such manner as is directed by the before-men-  
 "tioned statute of 8 Geo. II.; and that there-  
 "upon the said justices shall, in the manner di-  
 "rected by the said act, cause a taxation to be  
 "made, levied, and collected, for raising and  
 "paying, as well the costs and damages reco-  
 "vered by the plaintiff or plaintiffs, as also all  
 "such just and necessary expences, as any inha-  
 "bitant or inhabitants of such hundred shall have  
 "been at, in defending any such action, the  
 "same being first proved on oath, and the at-  
 "torney's bill being first taxed, in such manner  
 "as the said act directs; and the sums of money  
 "so to be levied and collected shall, within the  
 "time by the said act limited, be paid to the  
 "sheriff or sheriffs, and by him or them paid or  
 "delivered over to the persons entitled to receive  
 "the same, without any deduction, fee, or re-  
 "ward."



"ward." Upon this act, it seems that a writ of execution sued out by the party, who has recovered damages upon the *riot* act, and delivered by the sheriff to the justices, is a good foundation for an order to levy the amount<sup>1</sup>. But it has been determined, that the order of justices in such case, directing the money when levied to be paid into the hands of a banker, subject to their further order, is bad. It seems also, that the order for levying the money ought to be upon the inhabitants of the *towns, parishes, villages, and hamlets*, pursuant to the statute of 27 *Eliz.* and not upon the inhabitants of the *districts* and parishes within the hundred.

As against *common* persons, if the sheriff return on the original writ, or process of attachment, that the defendant has nothing by which he can be summoned or attached, a *capias* may be sued out, in order to arrest his person<sup>2</sup>. And where a *capias* lies, it is now generally issued in the first instance, without previously suing out the original<sup>3</sup>; in like manner as in Chancery, it was usual to issue the *subpœna*, without first bringing in the bill<sup>4</sup>. The *capias* is a

<sup>1</sup> 5 T. R. 341.

Com. 279, &c.

<sup>2</sup> *Ante*, 53. and see Com.

<sup>3</sup> *Ante*, 275.

Dig. tit. *Pleader*, 2 W. 2.

<sup>4</sup> Trye, 59.

Gilb. C. P. 14. 3 Blac.

judicial writ, issued by the filazer, and directed to the sheriff or sheriffs of the same county as the original; commanding them to take the defendant, if he be found in their bailiwick, and safely keep him, so that they may have his body in court, at the return of the writ, to answer the plaintiff in the action<sup>r</sup>; and it is usually called a special *capias ad respondendum*. If the sheriffs return to this writ, that the defendant is not found in their bailiwick, the plaintiff may have an *alias* or *pluries capias*, directed to the same sheriffs, commanding them, as *before*, or as *oftentimes* they have been commanded, to take the defendant<sup>q</sup>, &c.: or he may have a *testatum capias*, directed to the sheriffs of a different county, (and afterwards, if necessary, an *alias testatum capias*,) suggesting that the defendant lurks and wanders in that county<sup>r</sup>. In any of these writs, if the defendant be within a liberty, it is usual to insert a clause of *non omittas*<sup>s</sup>. So that, under particular circumstances, it may be necessary for the plaintiff to have recourse to an *alias* or *pluries testatum, non omittas, capias ad respondendum*, which is the most special writ of any, against the defendant's person; and com-

<sup>r</sup> Append. Chap. XIV.  
[F.]

<sup>q</sup> *Id.* [G.]

<sup>r</sup> Append. Chap. XIV.  
[H.]

<sup>s</sup> *Id.* [I.]

mands the sheriffs, as *before*, or as *oftentimes* they have been commanded, not to *omit*, by reason of any liberty, but to *take* the defendant, &c. it being *testified* that he lurks and wanders in their county.

The process upon the original should be *teste'd* in the name of the chief-justice, or senior judge of the court, if there be no chief-justice. The *capias* should regularly be *teste'd*, in term time, on the *quarto die post* of the return of the original<sup>t</sup>, but not on a Sunday, or other *dies non juridicus*<sup>u</sup>; and each succeeding writ should be *teste'd* on the *quarto die post* of the return of the preceding one. But unless the plaintiff mean to proceed to outlawry, the *capias* may be *teste'd* before the original, and even before the cause of action accrued, provided it be actually taken out afterwards; for no error can be assigned on mesne process<sup>v</sup>, and the defendant cannot haveoyer of the *capias*, so as to plead it in abatement<sup>w</sup>. These several writs must be made returnable, like the original, on a general return-day, in term-time, *ubicunque*, or *where-soever* the king shall then be in England; and there must be at least *fifteen* days between the

<sup>t</sup> But see Trye, 59, 184,  
&c. *semb. contra.*

<sup>u</sup> Trye, 191.

<sup>v</sup> 3 Wils. 434.

<sup>w</sup> *Per Cur.* E. 18 Geo. III.

<sup>2</sup> Crompt. 42.

teste and return<sup>2</sup>. They must be returnable however in the same, or the next term; for where a whole term intervenes, between the teste and return of a *capias*, it is null and void<sup>7</sup>.

The *want* of an original writ is aided after verdict, by the 18 Eliz. c. 14. but not after judgment by default, or confession<sup>2</sup>, or upon demurrer, or *nul tiel record*. And it has been holden, that an original writ which is bad in substance, or a good one which warrants not the declaration, is not aided by this statute<sup>2</sup>. Where the original however differs from the declaration, and is not between the same parties<sup>b</sup>, in the same county<sup>c</sup>, of the same term<sup>d</sup>, or for the same cause of action<sup>e</sup>, the court will *prima facie* intend that it is not the original upon which the action was brought; and where it is

<sup>2</sup> Trye, 60. 2 Wils. 117. in the original writ, or any  
but see 3 Wils. 454. 2 Blac. variance therefrom, is aided  
Rep. 918. S. C. after verdict.

<sup>7</sup> 2 Blac. Rep. 846.

<sup>b</sup> Cro. Eliz. 204. Hob.  
251.

<sup>2</sup> Stat. 4 Ann. c. 16. § 2.

<sup>c</sup> Cro. Jac. 654; 5, 674.

<sup>2</sup> 5 Co. 37. b. Cro. Eliz.  
722. Yelv. 108. Cro. Jac.

Palm. 428. 2 Rol. Rep.

185. Cro. Car. 282. 1 Lev.

382.; but see Cro. Jac. 479.

69. 1 Sid. 84. 2 Ld.

*contra*.

Raym. 1209; but see the

<sup>d</sup> Cro. Car. 272, 327.

stat. 5 Geo. I. c. 13. by

3 Mod. 136.

which any defect or fault,

<sup>e</sup> 10 Mod. 318. 11 Mod.

either in form or substance, 382.

certified to be the same, if the defendant in error comes in upon the *scire facias ad audiendum errores*, and alledges for diminution that it was not the original upon which he declared, the court will grant a new *certiorari*; and if upon such writ, there appears to be a good original, the plaintiff in error will not be suffered to make any allegation to the contrary <sup>f</sup>.

When all the proceedings are of the same term, an original writ of that term will warrant them<sup>g</sup>; and the curfitor will make it out, as a matter of course, at any time before the effoin-day of the ensuing term. But an original writ of the term wherein final judgment is given, will not warrant the judgment, if it appear upon record, that there have been proceedings of a preceding term<sup>h</sup>. And it is a rule in Chancery, that no curfitor shall make original writs of any return past, unless he receive instructions within the term wherein they are to be returnable, or at furthest on or before the effoin-day of the next succeeding term, without warrant from the lord chancellor, or master of the rolls<sup>i</sup>.

If the defendant therefore bring a writ of error, after a judgment by default, &c. it is usual for

<sup>f</sup> Cro. Jac. 597. Palm. 428. 11 Mod. 382. and see Run. Ej. 140.  
<sup>g</sup> 1 Keb. 327.

<sup>h</sup> 1 Will. 181.  
<sup>i</sup> Lord Clarendon's orders in Chancery. Imp. K. B. 682.



the plaintiff to present a *petition* to the master of the rolls, setting forth the proceedings in the action, and the bringing of the writ of error, and that the petitioner hath not sued out an original writ to warrant the judgment, which he is advised is necessary; and that the time for applying for the same in ordinary course being expired, the cursitor cannot make it out, without an order for that purpose<sup>k</sup>. On this petition, the master of the rolls will make an order, that the cursitor of the county where the venue is laid, do issue out an original writ, with a proper return; and that the petitioner pay the plaintiff in error his costs, if he do not proceed further, after having had notice of the order.

An original writ was not *amendable* at common law, in the case of a common person<sup>l</sup>. But it may be amended, by the statute 8 Hen. VI. c. 12. for the *mispriſon* of the clerk, in not following his instructions, or on account of his *negligence*, or want of skill, in matters of form, though not in substance<sup>m</sup>. And leave has been given to amend a special *capias*, in one of the defendants' names, in order that an application might be made to the master of the rolls, to pro-

<sup>k</sup> Law and Prac. of Error, 49. 1 Ld. Raym. 564.  
29, 30. and see Append. S. C.  
Chap. XIV. [K.]

<sup>m</sup> 8 Co. 159. Gilb. C. P.

<sup>l</sup> 8 Co. 156. b. 1 Salk. 117. Barnes, 10, 16, 22.

cure a new original<sup>a</sup>. When the cursitor or his clerk has been guilty of a mistake, in making out the original variant from the *præcipe*, which is the warrant for the original, the practice of the office is to set it right, as a matter of course, and re-seal the writ<sup>b</sup>: Or the amendment may be made on *motion*, or by *petition* to the master of the rolls; and it seems that before the return of the writ, the motion should be made in Chancery<sup>c</sup>, but afterwards, in the court where the writ is returnable<sup>d</sup>.

<sup>a</sup> 7 T. R. 299.

<sup>b</sup> 3 Atk. 599.

<sup>c</sup> 3 Atk. 596.

<sup>d</sup> Barnes, 10, 16, 22.

## C H A P. XV.

## Of OUTLAWRY.

WHERE the defendant is abroad, or keeps out of the way, so that he cannot be arrested or served with process, the plaintiff, on the return of *non est inventus* to the *pluries capias*, may have a writ of *exigi facias*, and proceed to *outlawry*<sup>a</sup>: or if there be several defendants in a joint action, and one of them be abroad, or keep out of the way, the plaintiff may have a writ of *exigi facias* against that defendant<sup>b</sup>; and must proceed to outlawry against him, before he can go on against the others<sup>c</sup>.

*Outlawry*, in civil actions, is putting a man out of the protection of the law, so that he is not only incapable of suing for the redress of injuries, but may be imprisoned, and forfeits all his goods and chattels, and the profits of his lands; his *personal* chattels *immediately* upon the outlawry, and his chattels *real*, and the profits

<sup>a</sup> 3 Blac. Com. 283. Gilb. C. P. 15.

<sup>b</sup> Trye, 155.

<sup>c</sup> 1 Str. 473. 1 Will. 78.

<sup>2</sup> Str. 1269. 1 Blac. Rep. 20. S. C.

of his lands, when found by inquisition<sup>d</sup>. So penal were the consequences of an outlawry, that until some time after the conquest, no man could have been outlawed except for felony, the punishment whereof was death: But in Bracton's time<sup>e</sup>, and somewhat earlier, process of outlawry was ordained to lie in all actions *vi et armis*; and since, by a variety of statutes, (the same as introduced the *capias*,) process of outlawry lies in *account*, *debt*, *detinue*, and divers other common or civil actions<sup>f</sup>.

If the defendant be a woman, the proceeding is called a *waiver*; for as women were not sworn to the law, by taking the oath of allegiance in the leet, (as men anciently were, when of the age of twelve years or upwards,) they could not properly be *outlawed*, or put out of the law, but were said to be *waived*, that is, *derelictæ*, left out, or not regarded<sup>g</sup>. And for the same reason, an *infant* cannot be outlawed, under the age of *twelve* years<sup>h</sup>.

Outlawry is either upon *mesne* process before, or upon *final* process after judgment<sup>i</sup>. Upon

<sup>d</sup> 1 Salk. 395.

<sup>e</sup> Bract. lib. v. p. 425.

<sup>f</sup> Co. Lit. 128. b. Trye,

72. Gilb. C. P. 15. Fort. 37.

<sup>g</sup> Lit. § 186. Co. Lit. 122.

b. Trye, 66.

<sup>h</sup> Co. Lit. 128. a.

<sup>i</sup> Trye, 77.

*mesne* process, the plaintiff cannot proceed to outlawry, unless the action be commenced by *original writ*<sup>k</sup>; nor can the defendant be outlawed after judgment, unless the action were so commenced: therefore, where the defendant was outlawed after judgment, in an action commenced by *bill of privilege*, it was holden that process of outlawry did not lie, as there was no *capias* in the original action<sup>l</sup>. After judgment, the plaintiff may have an *exigi facias*, and proceed to outlawry, upon a *capias ad satisfaciendum*, without an *alias* or *pluries*<sup>m</sup>; because the defendant, having been already in court before judgment, and having consance of the debt, ought to pay it on the first suing out of the *capias*, and his not performing the judgment is a contumacy, for which he is put out of the king's protection. And no writ of *proclamation* is required upon an *exigent* after judgment, but only upon *mesne process*<sup>n</sup>.

The writ of *exigi facias* is a judicial writ, made out by the *filazer*, as clerk of the *exigents*<sup>o</sup>, and directed to the sheriff of the county where

<sup>k</sup> 1 Sid. 159.

77, 124.

<sup>l</sup> 1 Leon. 329.

<sup>n</sup> Cro. Jac. 577.

<sup>m</sup> Gilb. C. P. 17. Trye,

<sup>o</sup> Trye, *in pref.*



the action is laid<sup>p</sup>, commanding him to cause the defendant to be *required* from county court to county court, or from *husting* to *husting*, if in *London*<sup>q</sup>, that is, at five *successive*<sup>r</sup> county courts or hustings, until he be outlawed, if he do not appear, and if he appear, to take him<sup>s</sup>, &c. This writ should be teste'd on the *quarto die post* of the return of the *pluries capias* before, or of the *capias* after judgment; and if there be not five county courts between the teste and return of it, there issues an exigent *de novo*, grounded upon the sheriff's return to the former writ, with a clause (from whence it is called an *allocatur* exigent) directing the sheriff to *allow* the several county courts, at which the defendant has been already required<sup>t</sup>.

In addition to the exigent, a writ of *proclamation*<sup>u</sup> was introduced by the statute 6 Hen. VIII.

<sup>p</sup> Fitz. Abr. tit. *Exigent*, proceed to outlawry. Trye, 26. Bro. Abr. tit. *Exigent* & 66. 3 Lev. 245.  
<sup>q</sup> *Capias*, 19. Dyer, 295. But <sup>r</sup> Plowd. 371.  
 see 3 Bac. Abr. 769. Gilb. <sup>s</sup> Trye, 112. and see App.  
 C. P. 15. Crompt. introd. pend. Chap. XV. [A.]  
 100. *semb. contra.* <sup>t</sup> *Id.* 114. Rast. Ent. 189.

<sup>u</sup> In *London* the hustings 355. and see Append. Chap.  
 are holden once every fort- XV. [B.]  
 night; on which account the <sup>v</sup> Gilb. C. P. 19. Trye,  
 action is generally laid there, 113. *Tbes. Brew.* 88. and see  
 when the plaintiff intends to Append. Chap. XV. [C.]

c. 4. which requires it to be directed to the sheriff of the county of which the defendant is called, or described in the original; for there he was supposed to dwell; and if he did not in fact dwell there, he might have avoided the outlawry, by the statute of additions. But the writ of proclamation is at present governed by the statute 31 Eliz. c. 3. § 1. which enacts, that "in every action personal, wherein any writ of *exigent* shall be awarded out of any court, a writ of *proclamation* shall be awarded and made out of the same court, having day of teste and return as the said writ of *exigent* shall have, directed and delivered of record to the sheriff of the county where the defendant at the time of the *exigent* so awarded shall be dwelling; which writ of proclamation shall contain the effect of the same action; and that the sheriff of the county, unto whom any such writ of proclamation shall be delivered, shall make three proclamations, *one* in the open county court, *another* at the general quarter-sessions of the peace, in those parts where the defendant at the time of the *exigent* awarded shall be dwelling, and the *third*, one month at the least before the *quinto*

“ *exactus* by virtue of the said writ of *exigent*,  
 “ at or near the most usual door of the church  
 “ or chapel of that town or parish, where the  
 “ defendant shall be so dwelling; and if the  
 “ defendant shall be dwelling *out* of any parish,  
 “ then in such place as aforesaid, of the next ad-  
 “ joining parish in the same county, and upon  
 “ a Sunday, immediately after divine service,  
 “ and sermon (if there be one), and if there be  
 “ no sermon, then forthwith after divine service;  
 “ and that all outlawries had and pronounced,  
 “ whereupon no writs of proclamations shall be  
 “ awarded and returned according to the form  
 “ of this statute, shall be utterly void and of  
 “ none effect.”

Upon the defendant's being put in *exigent*, he is either taken by the sheriff, appears voluntarily, or makes default. If he be taken, he either remains in custody of the sheriff, or gives bail, &c. as upon a common arrest. Formerly, if the defendant had appeared voluntarily, at any time before the return of the *exigent*\*, he might have obtained a writ of *supersedeas* from the *flazer*, as clerk of the *supersedeas*'s<sup>x</sup>, on entering a *common* appearance of the term in which the *exigent* issued<sup>y</sup>; and he may still do so,

\* Cal. Pr. C. P. 28.

19. Fort. 39. For the form of the writ, see Append.

<sup>x</sup> Trye, *in pref.*

<sup>y</sup> *Id.* 67, 68. Gilb. C. P. Chap. XV. [D.]

where

where the action does not require *special* bail. But upon a question agitated some years ago, whether in a case originally requiring *special* bail, if the defendant stand out to an *exigent*<sup>2</sup>, he can come in and appear to the *exigent*, without putting in special bail; it was ruled by the court, that there ought to be special bail. "It would be very unreasonable," they said, "that the defendant should gain an advantage, by standing out till process of outlawry: He certainly ought not to be in a better condition then, than if he had appeared at first." And accordingly the direction given was, that the filazer should not issue a *supersedeas*, till the defendant had put in special bail<sup>3</sup>.

If the defendant be neither arrested nor appear, but make default, at five successive county courts, or hustings, he is *outlawed* if a man, or if a woman she is *waived*, by the judgment of the *coroners*, or of the *recorder* in *London*<sup>b</sup>: and the judgment of outlawry being returned by the sheriff upon the *exigent*, the *filazer*, as clerk

<sup>2</sup> The question, as stated by Sir James Burrow, was, whether the defendant, standing out to an *outlawry*, can come in and appear to the *outlawry*, without putting in special bail: But upon inquiry, it appears to have been, as stated above, upon the *exigent*, before *outlawry*.  
<sup>a</sup> 3 Bur. 1920.  
<sup>b</sup> Co. Lit. 288. b. Gilb. C. P. 15, 16.

of the outlawries<sup>c</sup>, will make out a writ of *capias utlagatum*, which is either *general* or *special*<sup>d</sup>, and may be issued into any county, without a *testatum*<sup>e</sup>; nor is there any occasion, upon an outlawry *after* judgment, to revive the judgment by *scire facias*, after a year and a day<sup>f</sup>.

By the *general* writ of *capias utlagatum*, the sheriff is commanded, "that he do not omit, " by reason of any liberty of his county, but " that he take the defendant, if he be found " in his bailiwick, and him safely keep, so that " he may have his body in court, on a *general* " return-day, *wheresoever*, &c. *to do and receive* " *what the court shall consider of him*<sup>g</sup>." The defendant being taken by the sheriff on this writ, either gives bail to appear and reverse the outlawry, or remains in custody, until he actually reverse it, or obtain a charter of pardon, or be relieved under an insolvent act<sup>h</sup>.

At common law, the defendant could not have been bailed, when taken by the sheriff, on a *capias utlagatum*<sup>i</sup>: and this case is particu-

<sup>c</sup> Trye, *in pref.*

<sup>d</sup> *Id.* 65, 6. Gilb. C. P. 16.

<sup>e</sup> 1 Vent. 33. Gilb. C. P.

17.

<sup>f</sup> Cro. Eliz. 706. 5 Mod.

203. Gilb. C. P. 17.

<sup>g</sup> Trye, 115. and see Append. Chap. XV. [E.]

<sup>h</sup> 4 Bur. 2119, 2127.

<sup>i</sup> Trye, 73. 3 Bur. 1484.

4 Bur. 2540.



larly excepted out of the statutes 23 Hen. VI. c. 9. and 13 Car. II. stat. 2. c. 2. § 4.; by the latter of which statutes, it is expressly declared, that "no sheriff, &c. shall discharge "any person or persons, taken upon any writ "of *capias utlagatum*, out of custody, without "a lawful *supersedeas* first had and received for "the same." But now by statute 4, 5 W. & M. c. 18. § 4, 5. "If any person outlawed in "the court of King's Bench, other than for "treason and felony, shall be taken and arrested, "upon any *capias utlagatum* out of the said "court, the sheriff making the arrest may, "in all cases where special bail is not required by the said court, take an attorney's engagement under his hand, to appear for the defendant, and reverse the outlawry; "and may thereupon discharge the defendant "from such arrest: and, in those cases where "special bail is required by the said court, the "said sheriff shall and may take security of the defendant, by bond, with one or more sufficient surety or sureties, in the penalty of double the sum for which special bail is required, and no more, for his appearance by attorney in court, at the return of the writ, and to do and perform such things as shall be required by the said court; and after

14

" such

“such bond taken, may discharge the defendant from the said arrest: Or, in case the defendant shall not be able to give security as aforesaid, *before the return of the writ*, he shall and may be discharged, whenever he shall find sufficient security to the sheriff, for his appearance by attorney in the said court, at some return in the ensuing term, to reverse the outlawry, and to do and perform such other thing and things, as shall be required by the said court.”

This statute has been construed not to extend to *criminal* cases; at least, not to misdemeanors, after conviction<sup>k</sup>. And even in *civil* cases, the defendant cannot be bailed, where he was not bailable upon the process to outlawry<sup>l</sup>; for it was the design of the statute to put him in the same condition, as if he had not been outlawed: and therefore, he is not bailable, when taken upon an outlawry *after* judgment<sup>l</sup>. Neither, upon this statute, will the court restore goods, taken upon a special *capias utlagatum*<sup>m</sup>; but they will of course be restored, upon the reversal of the outlawry<sup>n</sup>.

<sup>k</sup> 4 Bur. 2539.

<sup>n</sup> Carth. 459. 1 Ld. Raym.

<sup>l</sup> *Id.* 2540.

349. S. C. *Post*, 313.

<sup>m</sup> *Per Cur.* M. 20 Geo. III.

Where

Where there is no affidavit of aailable cause of action, the sheriff is authorised, by the statute, to discharge the defendant, on an attorney's undertaking to appear and reverse the outlawry. But where an affidavit has been made, he ought not to be discharged, without giving the security required by the statute; which is not a *common* bail-bond, but a bond, with one or more sufficient surety or sureties, for appearance by attorney, at the return of the writ, *and to do and perform such things as shall be required by the court*<sup>o</sup>; that is, to put in bail to a new action, plead within a limited time, put the plaintiff in the same condition, and such like matters<sup>p</sup>. And it is not necessary that the affidavit should be made *before* the outlawry<sup>r</sup>, or the sum sworn to indorsed on the *capias utlagatum*<sup>s</sup>; but it is sufficient, if there be an affidavit before the defendant is discharged: the court having determined, that process of outlawry is not within the statutes for preventing frivolous and vexatious arrests<sup>t</sup>.

By the *special writ of capias utlagatum*, the sheriff is commanded, not only to take the de-

<sup>o</sup> 3 Bur. 1483.

<sup>p</sup> 4 Bur. 2540.

<sup>q</sup> 2 Str. 1178, 9. 1 Will.

3. S. C. Fort. 39. S. P.

<sup>r</sup> 3 Bur. 1482.

<sup>s</sup> *Forunes against Allen, M.*

10 Geo. II. cited in 3 Bur.

1483. Barnes, 322.

fendant,

fendant, as by the *general writ*, but also "to  
 "inquire, by the oath of honest and lawful  
 "men of his county, what *goods and chattels*,  
 "lands and tenements, he hath, or had on the  
 "day of his outlawry, or at any time after-  
 "wards; and by their oath to *extend* and *ap-  
 "praise* the same, according to their true value;  
 "and to *take* them into the king's hands, and  
 "safely keep them, so that he may answer to  
 "the king for the true *value* and *issues* of the  
 "same; making known what he shall do there-  
 "upon to the court, on the return-day<sup>1</sup>."

Upon this writ, the sheriff is to impanel a jury,  
 who are to make inquiry of the *goods* and  
*chattels* of the defendant, including his *debts*,  
 or *choses* in action, and also of his *leasehold* and  
*freehold* lands and tenements; to *appraise* the  
 goods, and to *extend* or value the lands, &c.  
 But they have nothing to do with his *copyholds*,  
 or *trust* property<sup>2</sup>. Witnesses may be *sub-  
 pana'd* to attend the execution of the inquiry<sup>3</sup>;  
 and when made, the sheriff is to take possession

<sup>1</sup> Trye, 115, 16. *Off. Brev.* P. 200.

35. *Thef. Brev.* 59, &c. Lil.  
 Ent. 552. and see Append.  
 Chap. XV. [F.]

<sup>v</sup> Parker, 190.

<sup>w</sup> Cro. Jac. 513. *Sty. Rep.*

41. But see the statute of

<sup>u</sup> 4 Co. 95. Lane, 23.  
 Lutw. 329, 1513. *Gilb. C.*

frauds, 29 Car. II. c. 3. § 10.

<sup>x</sup> *Imp. K. B.* 446.

of the goods and chattels of the defendant, and of the *leasehold* tenements in his own occupation<sup>y</sup>: But he must not oust or disturb the possession of his tenants<sup>z</sup>; and can only take the *issues* or profits of his *freehold* tenements<sup>a</sup>. The inquisition should set forth, with *convenient certainty*, the appraised value of the goods; the particulars of the *debts*; of what lands, &c. the defendant is seised or possessed, the different *parcels*, in whose *tenure*, and of what annual *value*, beyond reprises: But the inquisition, being merely an office of *instruction* or *information*, does not require so much *certainty* as an office of *entitling*<sup>b</sup>. And if the lands, &c. be *undervalued*, there may be a *melius inquirendum*<sup>c</sup>.

When the *special writ* of *capias utlagatum* is returned, it should be delivered, with the inquisition annexed, to the *filazer*, as clerk of the *exigents* and *outlawries*<sup>d</sup>, and afterwards filed in the office of the *custos brevium*<sup>e</sup>; from whence a *transcript* is sent into the exchequer<sup>f</sup>. Out of

<sup>y</sup> 9 Hen. VI. 20, 21.

<sup>z</sup> *Id.* 21 Hen. VII. 7.

<sup>a</sup> *Id.* Plowd. 541. Hardr. 106, 176. Bunb. 103, 105.

<sup>b</sup> 2 Salk. 469. Bunb. 103.

<sup>c</sup> Hardr. 106.

<sup>d</sup> Trye, *in pref.*

<sup>e</sup> *Id.* 88, 9. 3 T. R. 578, 9.

<sup>f</sup> Gilb. C. P. 16.



this court there issues a *venditioni exponas* to sell the goods, a *seire facias* to recover the debts<sup>a</sup>, and a *levari facias* to levy the issues and profits; under which latter writ, the sheriff may take not only the rent and moveables of the party outlawed, but also the cattle of a *stranger*, *levant* and *couchant* on the lands extended<sup>b</sup>. In aid of these writs, a *bill* may be exhibited in the exchequer against the outlaw, to compel a discovery of his real and personal estate, &c. either by the plaintiff, to enable him to take out execution, or by the attorney-general, on behalf of the crown<sup>c</sup>. And it is said to be the course of that court, upon an outlawry, to prefer an *information*, in the nature of a trover and conversion, against him that hath the goods of the party outlawed<sup>d</sup>.

The money raised by the sheriff, under these writs, belongs to the crown; but the plaintiff may have it paid to him, in satisfaction of his debt and costs, by applying to the court of exchequer, or lords of the treasury: and he may also obtain a *lease* of the lands, &c. under the

<sup>a</sup> Gilb. C. P. 16. 1 Lutw. last edition.

330.

<sup>c</sup> Hardr. 22.

<sup>b</sup> 1 Ld. Raym. 305, and the cases there cited, in the

<sup>d</sup> 1 Mod. 90.

exchequer seal<sup>1</sup>, or a *grant* of the king's right to levy the profits<sup>m</sup>. If the money raised by the sheriff do not exceed the sum of fifty pounds, the court of exchequer, on *motion*, will order it to be paid to the plaintiff: But if it exceed that sum, the plaintiff must *petition* for it to the lords of the treasury; stating the amount of his debt, a short abstract of the proceedings, with the expences he has been put to, and praying, in respect thereof, that the attorney-general may be authorized to consent, on behalf of the crown, that the money, remaining in the sheriff's hands, may be paid over to the petitioner<sup>n</sup>. The petition is *referred*, by the lords of the treasury, to their solicitor; who should be furnished with an *affidavit*<sup>o</sup>, sworn before a baron, of the amount of the debt and costs, and a *certificate* of the proceedings from the clerk in court<sup>p</sup>: whereupon he will make his *report*, which should be filed with the clerk of the treasury. A *warrant* is then issued, under the king's sign-manual, for the attorney-general to give his consent to an order, pursuant to the prayer of the petition; upon which a *motion* is made in the court of ex-

<sup>1</sup> Hardr. 106, 422. T.  
Raym. 17. 1 Lev. 33. S. C.

<sup>m</sup> 9 Hen. VI. 20. 2 Rol.  
Abr. 808. Gilb. C. P. 17.

<sup>n</sup> Append. Chap. XV. [G.]

<sup>o</sup> *Id.* [H.]

<sup>p</sup> *Id.* [I.]

chequer, and the attorney general consenting, an *order* is framed accordingly. This order must be engrossed, and put under seal, with a *subpoena* annexed to perform it; and the sheriff, being served therewith, must pay over the money, or will be liable to an attachment<sup>1</sup>.

Having thus shewn the consequences of an outlawry, I shall proceed to consider the mode of *reversing* it, where the party outlawed comes in *gratis*, or in consequence of an arrest upon the *capias utlagatum*. There are two ways of reversing an outlawry, 1st, by *writ of error*<sup>2</sup>, returnable *coram nobis*<sup>3</sup>; 2dly, by *motion*, founded on a plea, averment<sup>4</sup>, or suggestion of some matter apparent, as in respect of a *superfedeas*, omission of process, variance, or other matter apparent on the record: and yet, in these cases, some have holden, that in another term the defendant is driven to his writ of error. But for any matter of fact, as death, imprisonment, beyond sea at the time of the *exigent* awarded<sup>5</sup>, service of the king, &c. he is driven to his writ of error, unless it be in the case of felony, and

<sup>1</sup> Imp. K. B. 448. 2 Crompt. 60. and see Append. Chap. XV. [K.]

<sup>2</sup> Co. Lit. 259. b. Trye, 73. Fort. 38. <sup>3</sup> Carth. 459. 1 Ld. Raym. 349. S. C. 2 Sir. 1178.

<sup>4</sup> Trye, 74.

<sup>5</sup> Wilf. 3. S. C.

<sup>6</sup> Id. 69, 118, *Thef. Brev.*

there *in favorem vite* he may plead it. It seems, however, to be discretionary in the court to relieve by motion, or put the parties to a writ of error; and of late years they have gone further than heretofore upon motion, the more effectually to expedite justice, save expence, and preserve the credit and character of the defendant.

At common law, the party outlawed must have appeared in *person*, in order to reverse the outlawry; and could not have appeared by *attorney*. But now, by statute 4 and 5 W. and M. c. 18. § 3. for the more speedy and easy reversing of outlawries, in the court of King's Bench, "No person outlawed therein, for any cause, matter, or thing whatsoever, treason and felony only excepted, shall be compelled to come or appear in *person* in the said court; to reverse such outlawry, but shall or may appear by *attorney*, and reverse the same without bail, in all cases except where *special* bail shall be ordered by the said court."

Before the allowance of a writ of error, or reversing an outlawry, by plea or otherwise, *for want of proclamations*, the statute of *Elizabeth* requires, "that the defendant in the original

1 Cro. Jac. 462. Trye,  
71, 72. 2 Salk. 496.

1 31 Eliz. c. 3. § 3. 2  
Salk. 496.

“ action shall put in bail, not only to appear and  
 “ answer the plaintiff, in a new action to be com-  
 “ menced for the cause mentioned in the for-  
 “ mer<sup>\*</sup>, but also to satisfy the condemnation, if  
 “ the plaintiff shall begin his suit before the end  
 “ of *two terms* next after allowing the writ of  
 “ error, or otherwise avoiding the said outlawry.”

On reversing the outlawry for any *other* error in law, besides the want of proclamations, it was long unsettled, whether the defendant should be obliged to put in *special* bail. In the earliest cases upon the subject, it was determined that he should<sup>†</sup>: But there are cases to the contrary, in the time of *Holt*, Ch. J.<sup>‡</sup>; and in one of them<sup>§</sup> it is said, that if the party outlawed come in *gratis*, upon the return of the *exigent*, &c. he may be admitted by motion to reverse the outlawry, for any other cause than want of proclamations, without putting in bail; but if he come in by *cepi corpus*, he shall not be admitted to reverse it without appearing in person, as in such case he

<sup>\*</sup> The reason seems to be, that the process is determined by the outlawry; and consequently the plaintiff cannot declare upon it, but must bring a new action. Cro. Eliz. 707. but see March, 9.

<sup>†</sup> Lit. Rep. 301. Carth. 459. 1 Ld. Raym. 349. S. C. Gilb. C. P. 19.

<sup>‡</sup> 12 Mod. 545. 1 Ld. Raym. 605. S. C. 2 Salk. 496.

<sup>§</sup> 2 Salk. 496.



was obliged to do at common law, or putting in bail with the sheriff for his appearance upon the return of *cepi corpus*, and for doing what the court shall order. In two subsequent cases<sup>b</sup>, however, special bail was put in, upon reversing the outlawry, for errors in law, though it does not appear the party came in *gratis*. At length, in the case of *Serecold v. Hampson*<sup>c</sup>, the court, upon considering the words of the 4 and 5 W. and M. c. 18. § 3. which empowers the outlaw to appear by attorney, and says, "the outlawry shall be reversed without bail, in all cases except where special bail shall be ordered by the court," declared they were of opinion, they had a *discretionary* power to require it or not; and that the want of an affidavit *before* the outlawry was no objection<sup>d</sup>, because that is only requisite to warrant an arrest: And though the 31 Eliz. c. 3. § 3. be the only act that expressly requires bail, it is not to be inferred from thence, that in other cases it ought not to be insisted on; for that act makes a new error, and the bail upon it is absolutely to pay the condemnation-money. And accordingly, it is now settled, that

<sup>b</sup> *Wall & Wotton*, E. 12 G. I. cited in 1 Willf. 4. 2 Str. 951. 2 Barnard. K. B. 298. S. C. <sup>c</sup> 2 Str. 1178, 9. 1 Willf. 3. S. C. <sup>d</sup> *Ante*, 303.

on reversing an outlawry for any other error in law, besides the want of proclamations, the bail is *common* or *special*, in like manner as upon the arrest. Where *special* bail is required, it need not be put in before the allowance of the writ of error; but it is well enough, if put in at any time before the reversal<sup>e</sup>. The recognizance, in such case, is usually taken in the common form<sup>f</sup>; and, by a late determination<sup>g</sup>, the bail may render the defendant, and are not, at all events, answerable for the debt.

In general, an outlawry can only be reversed upon payment of *costs*: But if the process have been abused, and made subservient to purposes of oppression, as where a man has been outlawed, who was already in prison at the plaintiff's suit<sup>h</sup>, or being at large did not abscond, but appeared publicly, and might have been arrested or served with process<sup>i</sup>, the court, on motion, will order the plaintiff to reverse the outlawry at his own expence.

When the outlawry is reversed, or the defendant has obtained a charter of pardon, he may be

<sup>e</sup> 1 Ld. Raym. 605. 2 Str. 951. 2 Barnard. 298. S. C. <sup>h</sup> 2 Vent. 46. 2 Salk. 495. Barnes, 321.  
<sup>f</sup> But see 12 Mod. 545. <sup>i</sup> T. Jon. 211. Comb. 19. *per Holt*, & 2 Salk. 496. 12 Mod. 413.  
<sup>g</sup> Imp. K. B. 456.

discharged,

discharged, if in custody, by writ of *superfedeas*<sup>k</sup>; and his property<sup>l</sup>, if taken into the king's hands, shall be restored to him, by writ of *amoveas manus*, or otherwise, according to the course of the exchequer<sup>m</sup>. And where a sheriff's officer, being in possession of the tenant's effects under an outlawry, made a distress for rent, and sold the goods so distrained, and afterwards the outlawry was reversed; it was ruled, that the officer was liable to pay the produce of the goods to the landlord, in an action for money had and received<sup>n</sup>. Where the defendant has obtained a charter of pardon, he must sue out a *scire facias*, to give notice thereof to the plaintiff, in order that he may further prosecute his action, if he think proper<sup>o</sup>.

<sup>k</sup> 13 Car. II. stat. 2. c. 2. *personal*, see 5 Mod. 61.

<sup>l</sup> 4. Trye, 122.

<sup>m</sup> Trye, 90.

<sup>†</sup> As to chattels *real*, see

<sup>n</sup> 7 T. R. 259.

Cro. Eliz. 278. 2 Vern. 312.

<sup>o</sup> Trye, 134, 154.

Bunb. 105. and as to chattels

## CHAP. XVI.

*Of the PROCEEDINGS against PEERS of the Realm, and MEMBERS of the House of Commons.*

**A**T common law it seems that peers of the realm, and members of the house of commons, not being subject to a *capias*, could only have been sued by original writ, unless they were officers of the court, or in the actual custody of the marshal<sup>a</sup>. But now, by statute 12 and 13 W. III. c. 3. “Any person or persons, having cause of action against any knight, citizen, or burghers of the house of commons, or any other person entitled to privilege of parliament, may prosecute such knight, &c. in his majesty’s courts of King’s Bench, Common Pleas, or Exchequer, by summons and distress infinite, or by original *bill* and summons, attachment and distress infinite; which the said respective courts are empowered to issue against them, or any of them, until he or they shall enter a common appearance, or file common bail, to the plaintiff’s action, according to the course of each respective court.”

<sup>a</sup> *Ante*, 271.

Since

Since the making of this statute, *members* of the house of commons may be sued by *bill* and summons, &c. as well as by *original writ*<sup>b</sup>. And if a person having privilege of parliament be in the King's Bench prison, a declaration may be filed against him, as being in the custody of the marshal; and no summons need be issued<sup>c</sup>. There are also two cases, in which it has been determined, that a *peer* of the realm may be sued by *bill* and summons<sup>d</sup>, &c. But in a late case<sup>e</sup>, it was the opinion of the judges, on a question referred to them in the house of lords, that these cases were not to be considered as decisive authorities on the subject; though after pleading in chief, it was too late for the defendant to object to the jurisdiction of the court. It seems therefore that, notwithstanding the above statute, the only regular mode of proceeding against a peer, is by original writ<sup>f</sup>. Where an action is brought against a peer or member of the house of commons, jointly with other persons, the ori-

<sup>b</sup> 2 Ld. Raym. 1442. 2 Str. 734. S. C. But this mode of proceeding is not allowed, as against unprivileged persons. *Whitworth v. Richardson*, E. 23 Geo. III.

<sup>c</sup> 5 T. R. 361.

<sup>d</sup> Say. Rep. 63, 4. Cowp. 844.

<sup>e</sup> 2 H. Blac. 267, 299.

<sup>f</sup> Append. Chap. XVI.

[A.]



ginal writ or bill should be against all the defendants; upon which the peer or member should be summoned, and a *capias* issued against the other defendants.

In proceeding by *original* writ, against a peer or member of the house of commons, the original should issue into that county where the defendant lives; and a *summons*, which is nothing more than a copy of the original, is made out thereon by the plaintiff's attorney, and delivered to the sheriff, who serves it on the defendant<sup>a</sup>. Before or on the *quarto die post* of the return of the original, the defendant either appears or makes default; for he cannot cast an *essoin*<sup>b</sup>. If he make default, the plaintiff should sue out a *distringas*<sup>c</sup>, and after that (if necessary) an *alias* or *pluries distringas*<sup>d</sup>; upon which he may move to increase and sell the issues, as before directed<sup>e</sup>. Or if the sheriff return upon the *distringas*, &c. that the defendant hath nothing by which he can be

<sup>a</sup> 2 Crompt. 146. and it is said, that a peer or peeress cannot be *attached*, but should be brought in by *summons*,

<sup>b</sup> Str. 225.

<sup>c</sup> *Ante*, 277, 278.

<sup>d</sup> Trye, 9. and see Append. Chap. XVI. [B.]

<sup>e</sup> Append. Chap. XVI.

[C.]

<sup>f</sup> *Ante*, 279, 280.

distrained,

distrained, the plaintiff may have a *testatum distringas* into another county<sup>m</sup>.

The *distringas* and other subsequent process upon the original, state the cause of action at large<sup>n</sup>; and must be made returnable on a general return-day, *ubicunque*, or *wheresoever* the king shall then be in England. Each succeeding writ must be teste'd on the *quarto die post* of the return of the preceding one; and there must be *fifteen* days at least between the teste and return.

If the defendant appear, upon any of these writs, he should enter his appearance with the filazer<sup>o</sup>; and when the purpose of the writ is thus answered, "the issues (if any have been levied) shall be returned; or if sold, what shall remain of the money arising by such sale shall be repaid to the party distrained upon<sup>p</sup>." But the plaintiff in such case is entitled to his costs: and where he had obtained rules for selling the issues levied upon a *distringas*, *alias*, and *pluries*, and also a rule for an attachment against the sheriff, but the defendant appeared *before any*

<sup>m</sup> Trye, 10, 127. and see  
Append. Chap. XVI. [D.]

<sup>n</sup> Trye, 127.

<sup>o</sup> Imp. K. B. 425.

<sup>p</sup> Stat. 10 Geo. III. c. 50.

§ 4.

*issues had been actually levied*, the court ordered, that upon payment of the costs of issuing the writs, the rules should be discharged; being of opinion, that these costs were not to abide the event of the suit, but were to be paid to the plaintiff immediately, and at all events, whether he should finally succeed in the suit or not<sup>1</sup>.

The *bill* against a member of the house of commons, is a complaint in writing, describing the defendant as *having privilege of parliament*, and concludes with a prayer by the plaintiff, of process to be made to him, according to the form of the statute, &c. This bill is filed on treble-penny stamped parchment, with the clerk of the declarations, in the King's Bench office<sup>2</sup>; and the first process thereon is a writ of *summons*<sup>3</sup>; which is a judicial writ, issuing out of the same office, and directed to the sheriff of the county where the venue is laid, commanding him to summon the defendant. Upon this writ the defendant should be summoned, in like manner as upon the original; and, if he do not

<sup>1</sup> 5 Bur. 2725.

<sup>2</sup> Imp. K. B. 427.

<sup>3</sup> Say. Rep. 64. and see  
Append. Chap. XVI. [E.]

<sup>4</sup> *Id.* 8 Mod. 228. and see  
Append. Chap. XVI. [F.]

appear

appear at the return of it, is subject to the like process of *distringas*<sup>u</sup>, &c. If he appear, his appearance should be entered with the proper officer, in the King's Bench office.

The writ of summons, and other subsequent process upon the *bill*, differ from the process by *original*, in the following particulars; first, that they do not state the cause of action at large, but only require the defendant to answer the plaintiff, generally, in a *plea of trespass on the case, to his damage of, &c.* (according to the plea) *as he can reasonably shew that thereof he ought to answer*<sup>v</sup>; secondly, that they are teste'd on the very return, and not on the *quarto die post* of the return, of each other; thirdly, that they are made returnable on days *certain*, and not on *general* return-days; and fourthly, that there need not be fifteen days between the teste and return of them.

The defendant having appeared, the plaintiff proceeds to *declare* against him. The *time* allowed for declaring against a peer of the realm, or member of the house of commons, is the same as in other cases. But in assigning the breach in *assumpsit*, against a peer of

<sup>u</sup> Append. Chap. XVI. [G.]

<sup>v</sup> 2 Crompt. 146. Trye, 127.

the realm, the plaintiff must not charge the defendant with *contriving and fraudulently intending craftily and subtilly to deceive and defraud him*; for the house of lords have adjudged it a very high contempt and misdemeanor, to charge a member of their house with any species of fraud or deceit<sup>w</sup>.

All further proceedings against peers of the realm, and members of the house of commons, are the same as against other persons<sup>x</sup>; only it should be remembered, that as no *capias* lies against them, they cannot be taken in execution, unless where the judgment is obtained upon a statute-staple, or statute-merchant, or upon the statute of *Aiton Burnel*<sup>y</sup>, in which cases a *capias* lies, even against peers of the realm.

<sup>w</sup> 2 Crompt. 149.

<sup>y</sup> 11 Edw. I.

<sup>x</sup> 8 Mod. 229.



## C H A P. XVII.

*Of the DECLARATION.*

THE declaration is a legal specification of the cause of action; and in actions by *original*, is an exposition of the writ, with the addition of time, place, and other circumstances<sup>a</sup>. And it is either *in chief*, or *by the bye*. A declaration *in chief* is at the suit of the *same* plaintiff, for the *principal* cause of action, or that for which the writ was sued out: A declaration *by the bye* is at the suit of a *different* plaintiff, or of the *same* plaintiff, for a *different* cause of action.

In actions by *bill*, the plaintiff may declare in chief, as a matter of course, at any time before the end of the next term after the return of the process<sup>b</sup>: and if he be not ready to declare within that time, he may obtain a side-bar rule, from the clerk of the rules, for further time to declare, until the first day of the ensuing term;

<sup>a</sup> Co. Lit. 303. b.

*prod.* 2. 3 Bulst. 214. Cro.

<sup>b</sup> Stat. 13 Car. II. stat. 2.

Jac. 620. 2 Keb. 478, 812.

c. 2. § 3. And for the ancient time of declaring by

12 Mod. 217. R. M. 10

*bill*, see Gilb. C. P. 40, 41.

Geo. II. Reg. 2. (b.) 2 T.

Stat. 8 Eliz. c. 2. Hanf. In-

R. 112. 3 T. R. 123, 4.

a copy of which rule should be served on the defendant's attorney, or stuck up in the King's Bench office, if the defendant have not appeared<sup>c</sup>. This rule cannot, in general, be had where the defendant is a prisoner<sup>d</sup>. But where, on a writ against three, one was arrested and lay in gaol, and the other two absconded, the court refused to discharge the prisoner; saying, that he must appear for all, or lie in gaol till the other two were outlawed<sup>e</sup>. But the plaintiff, in such case, should move the court, or apply to a judge, for time to declare against the prisoner, until the outlawry or appearance of the other defendants<sup>f</sup>. If the plaintiff be still unprepared, he may obtain other rules for time to declare, from the beginning to the end of the term, and from the end of one term to the beginning of another, alternately, as often as may be necessary. But after several rules have been obtained, the court, on motion, will make a *peremptory* one, for the plaintiff to declare, before the end of the term, in which the motion is made<sup>g</sup>.

In actions by *original*, when the proceedings were *ore tenus*, at the bar of the court, the plain-

<sup>c</sup> Imp. K. B. 153.

401. 2 Blac. Rep. 759.

<sup>d</sup> Pr. Reg. 327.

<sup>f</sup> *Id. ibid.*

<sup>e</sup> *Per Cur. E.* 12 Geo. III.

<sup>g</sup> Imp. K. B. 153.

<sup>2</sup> Crompt. 9. Barnes, 396,

iff was anciently demandable on the defendant's appearance; and if he did not appear, or would not count against him, he might have been immediately nonsuited<sup>a</sup>. But the parties by consent, might have obtained a day before declaration, which was called a *dies datus prece partium*<sup>1</sup>; for the consent of the defendant exempted the plaintiff from the necessity of declaring immediately. In that case, if the defendant had made default at the day given, since there was no declaration, the plaintiff could not have had judgment, but was obliged to bring him in again by process<sup>b</sup>: for none could have judgment, but upon complaint exhibited against the defendant whilst in court. But after declaration, if the defendant had made default, judgment was given against him; because having deserted the court, he ceased to oppose the plaintiff's demands, and so submitted that the court should give judgment<sup>1</sup>.

In process of time, when the proceedings were no longer *ore tenus*, but the defendant was at liberty to appear by attorney, the defendant.

<sup>a</sup> 2 Hen. IV. 15, 23. 79. 3 Leon. 14. Benl. & Dallis. 153. S. C. 6 Mod. 6, 7, 8. 1 Salk. 216. S. C.

<sup>1</sup> Hardr. 365.

<sup>b</sup> 19 Hen. VIII. 6. Moor, <sup>1</sup> Gilb. C. P. 40, 41.

could not have nonsuited the plaintiff, without giving a rule to declare, and calling for a declaration. If the writ were returnable in *five weeks of Easter*, or on the *last* return of any term, the defendant, having given a rule, and called for a declaration, might have entered a nonsuit, if it were not delivered four days, or more, before the effoin-day of the ensuing term<sup>m</sup>: and if the writ were returnable on any other return, the defendant, having in like manner given a rule, and called for a declaration, might have entered a nonsuit, if it were not delivered some time during the same term<sup>n</sup>. But if the defendant had appeared the first term, and given no rule to declare, the defendant's attorney might have been compelled to accept a declaration the second term, with an imparlance; and the declaration might have been entered as of that term, with an imparlance over to the next term, or in the first term with an *incipitur*, as the case required<sup>o</sup>. In such case, however, if the plaintiff had not declared the second term, a nonsuit might have been entered at the end of the second term, upon a continuance over by *dies datus*, but not the third term or after<sup>p</sup>.

<sup>m</sup> R. M. 1654. § 15. K. B.

<sup>n</sup> *Id. ibid.* C. B.

<sup>o</sup> R. M. 1654. § 15. K. B.

<sup>p</sup> *Id. ibid.*

This was plainly agreeable to the *ancient* practice of the court of Common Pleas<sup>1</sup>. And now the plaintiff, according to the *modern* practice of that court, has a general liberty to declare by original, till the end of the next term after the return of the process, whether it be returnable on the first, or any other return of the term<sup>2</sup>. But still the defendant must, before the end of the second term, or within four days after, enter a rule for the plaintiff to declare, and demand a declaration in writing<sup>3</sup>; and if the plaintiff do not declare before the rule is out, the defendant may, at any time before the effoinday of the next term, sign a *nonpros*, but not afterwards<sup>4</sup>: and the plaintiff is not allowed any longer time to declare, without leave, than the time limited by the defendant's rule<sup>5</sup>. But if the plaintiff be not called upon by rule to declare, he hath all the vacation of the second term to declare in<sup>6</sup>.

When the defendant has appeared, and filed bail, upon process in trespass, or the plaintiff has

<sup>1</sup> R. M. 1654. § 14, 15.  
C. B.

<sup>2</sup> R. H. 9 Ann. C. B.

<sup>3</sup> R. M. 1 Geo. II. Reg. 2.  
C. B.

<sup>4</sup> R. H. 9 Ann. C. B.  
R. M. 10 Geo. II. Reg. 2.

(b) K. B.

<sup>5</sup> R. H. 9 Ann. C. B.

<sup>6</sup> Pr. Reg. 121.



filed it for him, according to the statute, the plaintiff may declare *by the bye*, in as many different actions as he thinks fit, at any time before the end of the next term after the return of the process\*. And after a plea in abatement, if the plaintiff enter on the roll *quod billa cassetur, et defendens eat sine die*, he may at any time during the same term, in which the process is returnable, deliver a declaration *by the bye* against the defendant†. It is also a settled point, that when bail is filed by the *defendant*, upon process in trespass, any other person, besides the plaintiff, may declare against him *by the bye*, at any time during the term wherein the process is returnable, *sedente curia*‡. But where bail is filed by the *plaintiff*, according to the statute, this is not such a general bringing of the defendant into court, as will warrant any person, except the plaintiff, in delivering a declaration *by the bye* against him‡. The plaintiff in the original action must declare in *chief*, before he can declare *by the bye*§; but any other person may

\* R. M. 10 Geo. II. Reg. 1. T. R. 627.

(b). But see Gilb. K. B. 310. ‡ 2 Str. 1027. Cal. temp.

‡ 5 T. R. 634.

Hardw. 207. S. C. R. M.

‡ Poph. 145. Carth. 377. 10 Geo. II. Reg. 1.

1 Salk. 2. S. C. Gilb. K. B. ‡ 6 T. R. 158. 7 T. R.

310, 342. 4 Bur. 2181. 3 80.

declare

declare *by the bye*, before the delivery of a declaration *in chief*<sup>b</sup>: And indeed, as the plaintiff is allowed *two* terms for declaring, another person who has only *one*, might otherwise be deprived of the opportunity of declaring *by the bye*. In actions *by original*, the privilege of declaring *by the bye* is much more limited; for though the *same* plaintiff is allowed to declare *by the bye*, for a *different* cause of action, at any time during the term in which the process is returnable, yet he cannot so declare after the end of that term; nor can any other person declare by the bye at all.

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The *Parts* of a declaration are first, the *title*; secondly, the *venue*; thirdly, the *commencement*; fourthly, the statement of the *cause of action*; and lastly, the *conclusion*<sup>c</sup>. The declaration by  
*bill*

<sup>b</sup> *Con. Phillips's Case*, 1 Crompt. 100.

<sup>c</sup> In *Heath's Maxims*, it is said that a count or declaration, being terms equivocal, ought principally to contain three things: first, the plaintiff's and defendant's names, which in actions *real* are called *demandant* and *tenant*, and the nature of the action; and this by some is termed the demonstration, or *demonstrative* part of the count; secondly, the time, the place, and the act; in which ought to be comprehended, how, and in what manner, the action did accrue, or first

*bill* should regularly be *entitled* of the day on which the writ is returnable; for the *bill*, of which it is a copy, cannot be filed till the bail is put in, which cannot be till the return of the writ<sup>d</sup>: And where there are several defendants, who put in bail of different terms, the declaration should be entitled of the term when the last bail was put in<sup>e</sup>. In practice it is usual, when the cause of action will admit of it, to entitle the declaration, whether by bill or original, *generally*, of the term in which the writ is returnable; and though filed or delivered, it cannot regularly be entitled, of a subsequent term<sup>f</sup>. But it should always be entitled, after the time when the cause of action is stated to have ac-

arise between the parties; when, what day, what year, and what place, and to whom the action shall be given; which is called the *declarative* part of the count: and lastly, the perclose or conclusion, which is *unde deterioratus est*, &c.; in which the plaintiff ought to aver, and proffer to prove his *suit*, and shew the *damage* he hath sustained, by the wrong and injury done him by the defendant. And this definition, it is quaintly observed, consisting of a *tria*, somewhat resembling the logical *major*, *minor*, and *conclusion*, some of the ancients (among whom none was more fond of it than Mr. *Fleetwood*, the famous recorder of London) conceived to be a perfect syllogism. Heath's Max. 2.

<sup>d</sup> Caf. *temp.* Hardw. 141. But *vide ante*, 195.

<sup>e</sup> 1 Wils. 242.

<sup>f</sup> 3 T. R. 624.

crued:

crued: therefore, where the cause of action is stated to have accrued, after the first day of the term in which the writ is returnable, the declaration should be entitled of a subsequent day in that term, and not of the term generally: for a general title refers to the first day of the term; and upon such a title, it would appear that the action was commenced, before the cause of it accrued. Yet, where the cause of action was stated to have accrued on the first day of term, the court on demurrer held, that the declaration might be entitled of the term generally; for the delivery of the declaration is the act of the party, and in ancient times it could not have been delivered till the sitting of the court: so that the cause of action might well have accrued, before the actual delivery of the declaration<sup>2</sup>. Where a declaration is improperly entitled, the plaintiff may have it corrected, on an affidavit of the fact<sup>3</sup>. Or it may be set right, at the instance of the defendant, if necessary for his defence: Thus, where the declaration is entitled of the term generally, and the defendant pleads *plene administravit*<sup>4</sup>, or a *tender* made before the exhibiting of the bill, upon which he would give in evidence an administration of assets, or

<sup>2</sup> 1 T. R. 116.

<sup>4</sup> Cas. temp. Hardw. 141.

<sup>3</sup> 1 Will. 78.

tender

tender made, between the first day of the term to which the bill relates, and the day of suing out the writ; he has a right to call upon the plaintiff, to entitle his declaration properly<sup>k</sup>.

The *venue* in personal actions, or county where the action is laid, and intended to be tried, is *local* or *transitory*<sup>l</sup>. Where the action could only have arisen in a *particular* county, it is *local*, and the venue must be laid in that county; for if it be laid elsewhere, the defendant may demur to the declaration<sup>m</sup>, or the plaintiff, on the general issue, will be nonsuited at the trial<sup>n</sup>. Such are all real and mixed actions, and actions of ejectment, and trespass *quare clausum fregit*, &c. But where the action might have arisen in *any* county, as upon contracts, it is *transitory*, and the plaintiff may, in general, lay the venue wherever he pleases<sup>o</sup>; subject however to its being changed by the court, if not laid in the very county where the action arose.

To use the words of Lord Mansfield, in the case of *Fabrigas v. Mostyn*<sup>p</sup>: There is a *formal* and a *substantial* distinction, as to the locality of

<sup>k</sup> 1 Str. 638. 1 Willf. 39.      <sup>n</sup> Cowp. 410. 2 Blac. Rep. S.C. cited. 1 Willf. 304. S.P. 1033.

<sup>l</sup> Gilb. C. P. 84.

<sup>o</sup> Gilb. C. P. 84.

<sup>m</sup> 1 Willf. 165.

<sup>p</sup> Cowp. 176, 7.



trials. I state them, says he, as different things. The *substantial* distinction is, where the proceeding is *in rem*, and where the effect of the judgment could not be had, if it were laid in a wrong place. That is the case of all ejectments, where possession is to be delivered by the sheriff of the county; and as trials in *England* are in particular counties, and the officers are county officers, the judgment could not have effect, if the action were not laid in the proper county.

With regard to matters that arise out of the realm, there is a *substantial* distinction of locality too; for there are some cases that arise out of the realm, which ought not to be tried any where but in the country where they arise; as if two persons fight in *France*, and both happening casually to be here, one should bring an action of *assault* against the other, it might be a doubt whether such an action could be maintained here; because, though it is not a criminal prosecution, it must be laid to be against the *peace* of the king; but the breach of the peace is merely local, though the trespass against the person is transitory. So if an action were brought, relative to an estate in a foreign country, where the question was a matter of title only, and not of damages, there might be a solid distinction of locality.

But

But there is likewise a *formal* distinction, which arises from the mode of trial: for trials in *England* being by jury, and the kingdom being divided into counties, and each county considered as a separate district or principality, it is absolutely necessary that there should be some county, where the action is brought in particular, that there may be a process to the sheriff of that county, to bring a jury from thence to try it. This matter of form goes to all cases that arise abroad; but the law makes a distinction between *transitory* and *local* actions. If the matter, which is the cause of a transitory action, arise within the realm, it may be laid in any county, the place not being material; as if an imprisonment be in *Middlesex*, it may be laid in *Surrey*, and though proved to be done in *Middlesex*, it does not at all prevent the plaintiff from recovering damages. The place of transitory actions is never material, except where by particular acts of parliament, it is made so; as in the case of churchwardens and constables, and other cases which require the action to be brought in the county. The parties, upon sufficient ground, have an opportunity of applying to the court in time, to change the venue; but if they go to trial without it, that is no objection.

So all actions of a transitory nature that arise abroad, may be laid as happening in an *English* county<sup>1</sup>. But there are occasions, which make it absolutely necessary to state in the declaration, that the cause of action really happened abroad; as in the case of specialties, where the date must be set forth. If the declaration state a specialty to have been made at *Westminster* in *Middlesex*, and upon producing the deed, it bears date at *Bengal*, the action is gone; because it is such a *variance* between the deed and the declaration, as makes it appear to be a *different* instrument. But the law has in that case invented a fiction; and has said, the party shall first set out the description truly, and then give a venue only for form, and for the sake of trial, by a *videlicet*, in the county of *Middlesex*, or any other county.

In an action upon a lease for rent, &c. where the action is founded upon the privity of *contract*,

<sup>1</sup> In a replication to a plea of *ne unques accomple*, &c. in a writ of dower, alledging a marriage in *Scotland*, it is not necessary to state, by way of venue, that the marriage was had in any place in *England*. 2 H. Blac. 145. Nor is it necessary to lay a venue, in a plea in abatement, that another person ought to have been sued jointly with the defendant; and if it be pleaded that such other person is alive, to wit in *Spain*, it will be considered as pleaded without any venue. 7 T. R. 243.

it

it is *transitory*, and the venue may be laid in any county, at the option of the plaintiff; but where the action is founded upon the privity of *estate*, it is *local*, and the venue must be laid in the county where the estate lies. Thus in an action of *debt* or *covenant*, by the lessor against the lessee, the action being founded on the privity of contract, is transitory<sup>1</sup>. So if an action of *debt* be brought by the lessor against the *executor* of the lessee, in the *detinet* only, it is transitory<sup>2</sup>. But if the action be brought, as it may, against the executor of the lessee, as *assignee*, upon the privity of estate, in the *debet* and *detinet*, it is local<sup>3</sup>. In *covenant* by the grantee of the reversion against the lessee, the action being founded on the privity of contract, which is transferred from the lessor to the grantee, by the operation of the statute 32 Hen. VIII. c. 34. the action is transitory<sup>4</sup>. But in *debt* by the assignee<sup>5</sup>, or devisee<sup>6</sup> of the lessor, against the lessee, which is founded on the privity of estate, the action is local. So if an action of *debt* or *covenant* be

<sup>1</sup> 3 Lev. 154. 6 Mod. 194. C. P. 91.

<sup>2</sup> Str. 776.

<sup>3</sup> 1 Saund. 238. Carth.

<sup>4</sup> Gilb. *Debt*, 403. Gilb. 183. 1 Willf. 165.

C. P. 91.

<sup>5</sup> Cro. Car. 183. 1 Willf.

<sup>6</sup> 2 Lev. 80. 3 Keb. 135. 165.

S. C. Gilb. *Debt*, 403. Gilb.

<sup>7</sup> W. Jon. 53.

brought by the lessor<sup>x</sup>, or his personal representatives<sup>y</sup>, or by the grantee of the reversion<sup>z</sup>, against the assignee of the lessee, it is local, and the venue must be laid in the county where the land lies.

There are however some actions, of a *transitory* nature, wherein the venue by act of parliament, must be laid in a particular county. Such are all actions upon penal statutes<sup>a</sup>, and actions upon the *case* or *trespass*, against justices of peace, mayors or bailiffs of cities or towns corporate, headboroughs, port-reves, constables, tithingmen, churchwardens, &c. or *other* persons acting in their aid and assistance, or by their command, for any thing done in their official capacity<sup>b</sup>; and also actions against any person or persons, for any thing done by an officer or officers of the *excise*<sup>c</sup> or *customs*<sup>d</sup>; or *others* acting in his or their aid, in execution, or by reason of his or their office. In these actions, the venue, by various acts of parliament, must be laid in the county where the facts were committed, and not elsewhere.

<sup>x</sup> 6 Mod. 194.

<sup>1</sup> Sid. 287.

<sup>y</sup> Latch, 197.

<sup>b</sup> Stat. 21 Jac. I. c. 12.

<sup>z</sup> Carth. 182. 3 Mod. 336. § 5.

<sup>1</sup> Salk. 80. 1 Show. 191.  
S. C.

<sup>c</sup> 23 Geo. III. c. 70. § 34.

<sup>d</sup> 24 Geo. III. Sess. 2.

<sup>a</sup> Stat. 21 Jac. I. c. 4. § 2. c. 47. § 35.

On



On the other hand, the venue in a *transitory* action, is in some cases *altogether* optional in the plaintiff; as where the action arises in *Wales*, or beyond the sea, or is brought upon a bond or other specialty, promissory note, or bill of exchange, for *scandalum magnatum*, or a libel dispersed throughout the kingdom, against a carrier or lighterman, or for an escape or false return, and, in short, wherever the cause of action is not wholly and necessarily confined to a single county\*. In these cases, the venue cannot be changed by the court, but upon a special ground.

In actions by *original*, the venue in the declaration should be laid in the county where the writ was brought; for otherwise, we have seen, the plaintiff will lose his bail<sup>f</sup>. And it is a general rule, that the county in the margin will help, but not hurt<sup>g</sup>: Hence, if there be no venue laid in the body of the declaration, reference must be had to the margin; but where a

\* See the cases referred to in Chap. XXV. was not originally meant to signify the county, but was

<sup>f</sup> *Ante*, 151. R. H. 22 only a denotation of each section or paragraph in the

<sup>g</sup> Lord *Hardwicke* was of record. *Cas. temp. Hardw.* opinion, that the word *¶* in 344. the margin of the declaration,

proper

proper venue is laid in the body, the county in the margin will not vitiate it<sup>a</sup>.

In actions by *bill*, against common persons, the declaration begins by stating the defendant to be in custody of the marshal; or if he be in custody of the sheriff, or bailiff, or steward of a franchise, having the return and execution of writs, it should alledge in whose custody he is, at the time of the declaration, by virtue of the process of the court, at the suit of the plaintiffs. If the action be brought by or against particular persons, as *assignees, executors, &c.* the special character in which they sue, or are sued, should be set forth in the beginning of the declaration. And in actions again *attornies*, instead of stating that they are in the custody of the marshal or sheriff, it should be stated that they are present in court; or, in actions against *peers* or *members* of the house of commons, that they have privilege of parliament.

In *account, annuity, covenant, debt, detinue, and replevin*, where the original is a *summons*, the declaration by *original writ* begins by stating, that the defendant was *summoned* to answer: in actions on the *case, ejectment, trespass, &c.* where

<sup>a</sup> *Caf. temp. Hardw.* 343, 4. *Barnes*, 483. 3 *T. R.* 387.

the original is an *attachment*, it states, that he was *attached* to answer<sup>1</sup>. But where by the declaration it appears, that the defendant was *summoned* instead of *attached*, or *vice versa*, the defendant cannot demur, without craving *oyer* of the original, and setting it forth, in order to shew that it does not warrant the declaration<sup>2</sup>.

It was formerly usual, for the declaration by original to repeat the whole of the original writ<sup>3</sup>. But this practice being productive of great and unnecessary prolixity, a rule of court was made, that "declarations in actions upon the *case*, and *general* statutes, other than *debt*, repeat not the original writ, but only the nature of the action, as that the defendant was *attached* to answer the plaintiff, *in a plea of trespass upon the case*, or *in a plea of trespass and contempt, against the form of the statute*". And even in *trespass vi et armis*, commenced by original, it has been deemed sufficient, on a general de-

<sup>1</sup> Com. Dig. tit. *Pleader*, *Moss*, C. B. And as *oyer* cannot now be had of the

<sup>2</sup> Cro. Jac. 108. Cro. original writ, it seems that the declaration is no longer demurrable, for the above cause.

Car. 91. 1 Saund. 318. 1 Sid. 423. 2 Keb. 344. 1 Mod. 3. S. C. 4 Mod. 246. 2 Salk. 701. 6 Mod. 28. <sup>1</sup> Com. Dig. tit. *Pleader*, S. C. Fort. 341. *Caf. temp.* C. 12.

Hardw. 189. *Barnard v.* <sup>2</sup> R. M. 1654. § 12.

murrer, to state, in the declaration, that the defendant was attached to answer the plaintiff *in a plea of trespass*, without setting forth the circumstances<sup>n</sup>.

In actions upon *contracts*, the declaration must in all cases state the *contract* upon which the action is founded, and the *breach* of it: And this alone, without more, is in some cases sufficient, as in an action of *debt* on bond, by the obligee against the obligor. *Contracts* are either in *writing*<sup>a</sup>, or by *parol*; if in writing, they are either by *deed* under seal, or by *agreement* without seal. And they are either *express* or *implied*; the former are created by the words, the latter by the obvious meaning and intention of the parties. Thus a covenant is implied, from the *habendum* in a lease, for quiet enjoyment; and from the *reddendum*, for payment of the rent<sup>p</sup>: So on the indorsement of a note or bill, it is implied, that if the drawer or acceptor do not pay it, the indorser will, on having due notice of its non-payment<sup>q</sup>: And in general it may be remarked, that promises are implied,

<sup>n</sup> Carth. 108.

ries, 29 Car. II. c. 3.

<sup>p</sup> For the cases in which it is necessary that the contract should be in *writing*, see the statute of frauds and perju-

<sup>q</sup> 3 Bac. Abr. 296.

<sup>r</sup> Bayley on Bills, 29, 41, 42, 57.

to pay money on legal liabilities'. With regard to their operation, contracts are *present* or *future*; under the former, may be ranked *warranties*, that a horse is sound, &c. the latter are to do or omit some act, or to procure it to be done or omitted by another. Contracts must be stated in the declaration as they were really made, either in terms, or according to their legal effect; and if there be a variance, it will be fatal\*.

Where the contract is by deed, it is not necessary to set forth the *consideration* upon which it is founded; as the law in this case *implies* a consideration, where none is stated: And a consideration is also implied, upon bills of exchange, and promissory notes: But in all other cases, the consideration not being implied, must be stated in the declaration. *Considerations* are commonly said to be *executed* or *executory*; or in other words, the contract is founded upon something already done, or to be done: But there is a third species of considerations, partaking of the nature of both the others, as upon *mutual promises*†, where the plaintiff's promise is executed, but the thing which he has en-

\* *Ante*, 4.

† 1 Salk. 171. 1 Ld.

‡ Doug. 640. but see 3 Raym. 665. S. C.  
T. R. 643.



gaged to perform is executory. In the case of a consideration executed, the defendant cannot traverse the consideration by itself, because it is incorporated and coupled with the promise, and if it were not then in fact executed, it is *nudum pactum*: But if it be executory, the plaintiff cannot bring his action till the consideration performed; and if in truth the promise were made, and the consideration not performed, the defendant must traverse the performance, and not the promise, because they are distinct<sup>a</sup>.

It is also commonly said, that to make a good consideration, there must be either an immediate benefit to the party promising, or a loss to the person to whom the promise was made. But this rule is too narrow: For wherever a man is under a *moral* obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration; as if a man promise to pay a just debt, the recovery of which is barred by the statute of limitations; or if a man, after he comes of age, promise to pay a meritorious debt contracted during his minority, but not for necessities; or if a bankrupt, in affluent circumstances after his certificate, promise to pay the whole of his debts; or if a man promise to per-

<sup>a</sup> Bul. Ni. Pri. 146.

form a secret trust, or a trust void for want of writing by the statute of frauds. In these and many other instances, though the promise gives a compulsory remedy, where there was none before, either in law or equity; yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright mind are a sufficient consideration \*.

Where the promise and consideration explain themselves, without reference to any collateral matter, they are stated in the declaration without any *inducement*: But where that is not the case, the declaration begins by stating the circumstances under which the contract was made, or to which the consideration refers; as in an action of *assumpsit* to pay money, in consideration of forbearance, or of staying proceedings, the declaration begins by stating the debt forborne, or the proceedings that were stayed. The inducement is in nature of a preamble, and leads on to the principal matter of the declaration; and as its office is explanatory, it does not require exact certainty \*.

Where the consideration is *executed*, and the promise to pay a sum certain, or to do or

\* *Per Lord Mansfield, Cowp.*  
290.

\* *Com. Dig. tit. Pleading,*  
C. 31.

omit some specific act, the declaration proceeds at once from the contract to the breach, without any intermediate *averments*; as in the case of an *indebitatus assumpsit*, to pay a precedent debt. But where the consideration is *executory*, or the performance of the defendant's covenant or agreement is made to depend on the performance of a condition precedent, on the part of the plaintiff, the declaration ought to *aver* that the consideration has been executed, or the condition performed; for it is a rule, that in all cases, where the estate or interest commences on a condition precedent, be the condition or act in the affirmative or negative, and to be performed by the plaintiff, the defendant, or any other, the plaintiff ought, in his count, to aver performance\*. As, if a man grant an annuity to another, *when* he is promoted to such a benefice, &c. the plaintiff in *Annuity* ought to aver, that he is promoted<sup>y</sup>, &c. But where any estate or interest passes or vests immediately, and is to be defeated by a condition *subsequent*, or matter *ex post facto*, be it in the affirmative or negative, or to be performed by the plaintiff, or the defendant, or any other,

\* 7 Co. 10. a.

<sup>y</sup> Pl. Com. 25. b.

performance of that matter need not be averred<sup>1</sup>. As if a grant be of an annuity to A. *till* he be advanced to a benefice, A. in *Annuity* need not say that he is not yet advanced<sup>2</sup>.

Covenants or agreements are of three kinds; first, such as are called mutual and independant, where either party may recover damages from the other, for the injury he may have received, by a breach of the covenants in his favour, and where it is no excuse for the defendant to alledge a breach of the covenants on the part of the plaintiff: secondly, there are covenants which are conditions and dependant, in which the performance of one depends on the prior performance of another; and therefore, till this prior condition be performed, the other party is not liable to an action on his covenant: thirdly, there is also a sort of covenants, which are mutual conditions to be performed at the same time; and in these, if one party was ready, and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered, has fulfilled his engagement, and may maintain an action for the default of the other, though it be

<sup>1</sup> 7 Co. 10. a. 32. b. and see, 1 T. R.

<sup>2</sup> *Id.* Pl. Com. 25. b. 30. 645. 2 H. Blac. 579.

not certain that either is obliged to do the first act<sup>b</sup>.

The dependance or independance of covenants, is to be collected from the evident sense and meaning of the parties; and however transposed they may be in the deed, their precedency must depend on the order of time, in which the intent of the transaction requires their performance<sup>c</sup>. The words by which conditions precedent are commonly created, are *for*<sup>d</sup>, *in consideration of*, *ita quod*<sup>e</sup>, *proinde*<sup>f</sup>, &c. In general, if the agreement be that one party shall do an act, and that for the doing thereof the other shall pay a sum of money, the doing of the act is a condition precedent to the payment, and the party who is to pay shall not be compelled to part with his money, till the thing be performed<sup>g</sup>. And

<sup>b</sup> *Per Lord Mansfield*, in 1 Ld. Raym. 440, 686. 2 the case of *Kingston v. Preston*, cited in Doug. 690, 91. Salk. 623. Com. Rep. 117. 12 Mod. 529. S. C. 1 Str.

<sup>c</sup> *Id.* and see 6 T. R. 570, 535; 615. 2 Str. 712. 1 668. 7 T. R. 130. Wils. 88. 2 Bur. 899. 2

<sup>d</sup> 1 Vent. 177, 214. 2 Blac. Rep. 1312. Doug. 27, Saund. 350. S. C. 272, 620, 684. 1 T. R. 639.

<sup>e</sup> 2 Ld. Raym. 766. 1 H. Blac. 270. 4 T. R. 761.

<sup>f</sup> Doug. 688. 2 H. Blac. 123, 389, 574.

<sup>g</sup> 1 Salk. 171. 1 Ld. 5 T. R. 409. 6 T. R. 570. Raym. 665. S. C. and see 665, 710. 7 T. R. 125.

however



however improbable the thing may be, it must be complied with, or the right which was to attach on its being performed does not vest: As if the condition be, that A. shall enfeoff B., and A. do all in his power to perform the condition, and B. will not receive livery of seisin, it was never doubted, but that the right which was to depend on the performance of the condition did not arise<sup>1</sup>. If a person undertake for the act of a *stranger*, the cases are uniform to shew that such act must be performed<sup>1</sup>. And where there are *mutual* promises, yet if one thing be the consideration of the other, there a performance is in general necessary<sup>2</sup>.

If a day be appointed for payment of money, and the day is to happen before the thing can be performed, an action may be brought for the money before the thing is done; for it appears, that the party relied upon his remedy, and intended not to make the performance a condition precedent<sup>1</sup>: But where a certain day of payment is appointed, and that day is to happen subsequent to the performance of the

<sup>1</sup> 6 T. R. 719.

570. 7 T. R. 125.

<sup>2</sup> *Id.* 722.

<sup>1</sup> 1 Salk. 171, 2. 1 Ld.

<sup>2</sup> 1 Salk. 171. 1 Ld. Raym. 665, 6. S. C. and Raym. 665. S. C. 6 T. R. see 2 H. Blac. 392.

thing to be done by the contract, in such case performance is a condition precedent, and must be averred in an action for the money<sup>l</sup>. So if two men should agree, one that the other should have his horse, the other that he will pay 10*l*. for him, no action lies for the money, till the horse be delivered<sup>l</sup>. Another distinction to be attended to is, that where mutual covenants go to the *whole* of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where they go only to a *part*, and a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent<sup>m</sup>. And it is said, that where the participle *doing, performing, &c.* is prefixed to a covenant by another person, it is a mutual covenant, and not a condition precedent<sup>n</sup>.

An *averment* may be by any words, which imply that the matter is as stated; as that the plaintiff *avers*, or *in fact saith*, or *although*, or *because*, or *with this that*, &c.\* And where

<sup>m</sup> 1 H. Blac. 273. and  
see 6 T. R. 572, 3.

<sup>a</sup> 2 Blac. Rep. 1313.

\* Com. Dig. tit. *Pleader*,  
C. 77.

there

there is a condition *precedent*, it is necessary to state in the declaration, that it has been performed, or a lawful excuse for its non-performance<sup>p</sup>. But there are some cases in the books, respecting conditions precedent, where the thing agreed to be done having been in effect performed, though not in the exact manner, nor with all the circumstances mentioned, it was deemed a substantial performance<sup>q</sup>; as where the condition was to enfeoff, a conveyance by lease and release has been deemed sufficient<sup>r</sup>: So if the condition be for one to deliver the will of the testator, and he deliver letters testamentary<sup>s</sup>. And wherever a man, by doing a *previous* act, would acquire a right to any debt or duty, by a tender to do the previous act, if the other party refuse to permit him to do it, he acquires the right as completely, as if it had been actually done; and if the tender be defective, owing to the conduct of the other party, such incomplete tender will be sufficient; because it is a general principle, that he who prevents a thing from being done, shall not avail himself of the non-performance, which he has

<sup>p</sup> 4 T. R. 761. 6 T. R.

570.

<sup>q</sup> 6 T. R. 722.

<sup>r</sup> Co. Lit. 207. a.

<sup>s</sup> 1 Rol. Abr. 426. pl. 2, 4.

occasioned'. The performance of a condition precedent is also excused, by the *absence* of the plaintiff, in those cases where his *presence* is necessary, for the performance of the condition; by his *obstructing* or preventing the performance; or by his *neglecting* to do the first act; if it be incumbent on him to perform it<sup>1</sup>: It is also excused in some cases, by his not giving notice to the defendant<sup>2</sup>. Where the conditions are *mutual*, and to be performed at the same time, the plaintiff must aver that he was ready and offered to perform his part, but the defendant refused to perform his<sup>3</sup>. And where the sum to be paid is not ascertained by the contract, the plaintiff must aver the facts necessary to ascertain it; as upon a *quantum meruit*, or *valebant*, that the plaintiff *deserved* to have, or that the goods were *worth*, a certain sum, &c.

Where the contract is to pay a collateral sum upon request, there the *request* being parcel of the contract, and as it were a condition precedent, ought to be specially alledged, with the time and place of making it<sup>4</sup>; but where the

<sup>1</sup> Doug. 686. and see 1 T. R. 638.      <sup>2</sup> 7 T. R. 130.  
<sup>3</sup> 1 Roll. Abr. 457, 8.      <sup>4</sup> Com. Dig. tit. *Pleader*, C. 69. and see 2 H. Blac.  
<sup>5</sup> *Id.* 463, 467, 8. and 131. 5 T. R. 409.  
 see Co. Lit. 207. a.

contract

contract is founded upon a precedent debt or duty, as in the case of a bond, or for money lent<sup>r</sup>, &c. or is for the payment of a collateral sum on a day certain<sup>s</sup>, or otherwise than upon request<sup>t</sup>, or the debt or duty arises immediately upon the performance of the consideration<sup>b</sup>, there it is not necessary to alledge a special request, but *licet sapius requisitus* is sufficient; which is only a form of pleading, and if it be omitted, does not vitiate the declaration<sup>c</sup>.

Where the matter alledged lies more properly in the consufance of the plaintiff, than of the defendant, there the declaration ought to shew that *notice* was given to the defendant<sup>d</sup>; as where the defendant promises to give the plaintiff so much for a commodity as it is worth, or as any other had given him for the like, or to give so much for every cloth the plaintiff should buy, or to pay the plaintiff what damages he had sustained by a battery, or to pay the plaintiff's costs of suit<sup>e</sup>: And when notice is necessary, it ought to appear

<sup>r</sup> 1 Saund. 32.

<sup>s</sup> Owen, 109.

<sup>t</sup> 1 Lutw. 231.

<sup>b</sup> 1 Str. 188.

<sup>c</sup> Pl. Com. 128. b. Hard.

38, 72.

<sup>d</sup> Hard. 42. and see 16 Vin. Abr. tit. *Notice*, 5 T.

R. 621.



that it was given in due time, and to a proper person\*. But where the matter does not lie more properly in the conscience of the plaintiff, than of the defendant, no notice is requisite; as in debt upon an obligation conditioned to perform an award, notice of the award need not be alledged, because the defendant may take notice of it, as well as the plaintiff: So if upon a treaty of marriage, a promise be made to the father of the daughter, by the father of the son, to pay the daughter 100l. after the death of the son, if she survive him, and the son die, an action may be brought upon this promise; and notice need not be given to the defendant, of the death of the son†. So on a promise to pay so much money at the full age of an infant, notice of his attaining that age need not be given, because it is as notorious to the one as to the other†.

The *breach*, in a declaration upon contract, is either *negative*, that the defendant has not done something which he contracted to do, or procured it to be done by another, or that he has not done it, or procured it to be done, in a careful and proper manner; or it is *affirmative*, that he has done something which he contracted

\* Com. Dig. tit. *Pleader*, C. 74.

† Hard. 42.

not to do, or suffered it to be done by another, or that he has *deceived* the plaintiff, on a warranty, &c. The breach must be assigned in the words of the contract, or in words tantamount, which comprehend the substance and effect of it: And in assigning the breach of a covenant for quiet enjoyment, it is sufficient to alledge, that at the time of the demise to the plaintiff, A. B. had lawful right and title to the premises, and having such right and title, entered and evicted the plaintiff, without shewing what title A. B. had, or that he evicted plaintiff by legal process\*. Where the *damages* sustained by the plaintiff are naturally connected with the breach of contract, it is not usual to state them specially in the declaration; otherwise they should be stated, in order to prevent a surprise upon the defendant.

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In actions for *wrongs*, the declaration should state the *injury* complained of; and in actions on the case, by way of *inducement*, the circumstances under which the injury was committed, and the consequential *damages* resulting therefrom to the plaintiff. The injury complained

of is *immediate* or *consequential*. Where it is *immediate*, and included in the act complained of, there it is sufficient to state that act alone in the declaration, as in trespass *vi et armis*. The charge in such case ought to be direct and positive, and not merely by way of recital: Therefore a declaration by *bill*, stating that *whereas*, or *wherefore* the defendant did the act complained of, is bad on special demurrer; and was formerly holden to be so, in arrest of judgment<sup>b</sup>: but now, it may be amended at any time before or after judgment, by a right bill; the time of filing whereof the court will not inquire into<sup>c</sup>: And by *original*, the count-part being helped by the recital of the writ, this fault is not fatal, even on a special demurrer<sup>d</sup>.

Where the *damages* in trespass are such as naturally arise from the act complained of, or cannot with decency be stated, they may be given in evidence under the *alia enormia*; but otherwise they must be stated in the declaration<sup>e</sup>. And many things may be laid in aggravation of damages, for which alone trespass would not lie; as trespass may be brought for entering the plaintiff's house, and beating his wife, child,

<sup>b</sup> 2 Salk. 636. 1 Str. 621. S. C. 2 Wils. 203.

<sup>c</sup> 2 Str. 1151, 1162.

<sup>d</sup> Peake's Cas. Ni. Pri.

<sup>e</sup> 1 Wils. 99. Barnes, 452. 46, 62.

or servant: but in such case the plaintiff cannot recover damages for losing the *service* of his child or servant, because he may have a proper action for that purpose, nor can it be given in evidence; but the *beating* may be given in evidence, to aggravate the damages: for now, though it has been holden otherwise formerly, if the principal matter will bear an action, the plaintiff may give any thing in evidence in aggravation of damages, that will not of itself bear an action, for if it will, it must be shewn; as in trespass *quare clausum fregit*, the plaintiff would not be permitted to give evidence of the defendant's taking away a horse, &c. but in trespass *quare clausum et domum fregit*, he may give in evidence that the defendant came into his house, and defiled his daughter<sup>m</sup>.

Consequential injuries, we have seen, arise from *mal-feasance*, *non-feasance*, or *mis-feasance*. In actions for mal-feasance, three things are to be attended to in the declaration; first, the *motive* which urged the defendant to the commission of the act complained of; secondly, the *end* which he had in view; and thirdly, the *means* which he took of accomplishing it. Thus in an action for defamation, the motive is malice, the end

<sup>m</sup> Bul. *Ni. Pri.* 89. and see 2 Salk. 642. 1 Str. 61.  
1 Sid. 225. 6 Mod. 127. 4 Bur. 1878.

proposed is to injure the plaintiff in his good name, &c. and the means are the words spoken by the defendant for that purpose. In actions for mal-seasance, the injury complained of is either founded in *malice*, which is generally speaking the motive that leads to the commission of injuries to the person; and injuries of this nature are frequently committed under colour of legal process: or it is founded in *deceit*, which is either where there is a privity between the parties, as upon a sale of goods, &c. or where there is no such privity; or else it consists in some act of *injustice*, chiefly arising from the defendant's having too great a regard to his own interest, without sufficiently attending to the rights of others: Under the latter head may be ranked *trover*, *nusances* of a public or private nature, and *disturbance* of commons, &c. In actions for *non-seasance*, or *mis-seasance*, the injury frequently proceeds from a mere neglect, without any bad motive, in the defendant: Under the former, may be ranked actions for not repairing fences, or for not carrying away tythes<sup>a</sup>, &c.; under the latter, the *misconduct* of sheriffs or other officers, and *negligence*, either where there is a privity between the parties,

<sup>a</sup> 3 Lev. 400.



as in the case of carriers, &c. or where there is no such privity, as in actions for negligently riding horses, driving carriages, or navigating ships, &c.

The circumstances attending the several injuries before-mentioned, and which should be stated by way of *inducement*, are various, according to the nature and grounds of the action. In general, they disclose some *right* or *title* in the plaintiff, or some *duty* to be performed by the defendant. In actions for wrongs affecting the *absolute* rights of persons, the right to personal security being implied, need not be stated in the declaration; as in actions of *assault* and *battery*, &c. But where the wrongs complained of affect the *relative* rights of persons, the relation should be stated, in respect of which the plaintiff is injured; as in actions for *criminal conversation*, &c. And where an action is brought for *defamation*, it is usual to state in the declaration, by way of inducement, that the plaintiff is a person of good name, &c. and has not been guilty of the crime imputed to him<sup>o</sup>.

In actions for wrongs to *real* or *personal* property, the plaintiff's right or title must be set

<sup>o</sup> Com. Dig. tit. *Action upon the Case for Defamation*, G. 1.

forth in the declaration, either *generally* or *special*ly. Where a *special* title is necessary to maintain the action, it must be stated with certainty: If a man alledge in himself a title to the inheritance or freehold of lands in possession, he ought regularly to say, that he was *seised*<sup>1</sup>; or if he alledge possession of a term for years, or other chattel-real, that he was *possessed*<sup>2</sup>: So if he alledge seisin of things manurable, as of lands, tenements, rents, &c. he should say that he was seised *in his demesne as of fee*<sup>3</sup>; if of things not manurable, as of an advowson, that he was seised *as of fee and right*, omitting *in his demesne*<sup>4</sup>. And it is a rule, that where title is necessary to be shewn, if the plaintiff derive a particular estate from another, he ought to shew, that the other had such an interest as would enable him to make the estate<sup>5</sup>. The reason why the commencement of particular estates must be shewn in pleading is, because they are created by agreement out of the primitive estate; and the court must judge, whether the primitive estate and agreement be sufficient to produce the particular estate claimed: And this is a fundamental rule, which ought not to be broken upon

<sup>1</sup> Co. Lit. 17. a.

<sup>2</sup> Com. Dig. tit. *Pleader*,

<sup>3</sup> Lit. § 10. and see Com. C. 36.

Dig. tit. *Pleader*, C. 35.

fancied inconveniences\*. It is also a rule, that if the plaintiff claims under one, who has only a particular estate, as for life, he must aver the continuance of that estate†.

In setting forth a title to *incorporeal* hereditaments, the plaintiff must shew that it was by grant, custom, or prescription. A *grant* ought regularly to be pleaded, with a *profert in curia* of the deed containing it; but where the deed is lost or destroyed, by accident or length of time, it may be pleaded without a *profert*‡. *Custom* is properly a *local* usage, and not annexed to any particular *person*; such as a custom within a manor, that lands shall descend to the youngest son, or that copyholders shall have a right of common, &c. *Prescription* is altogether a *personal* usage; and is either in a *que estate*, or in a man and his *ancestors*; the former is where the right claimed is annexed to, and passes with the land, in which case the plaintiff states that he, and all those whose estate he hath therein, have immemorially had such right; the latter is where the right is not annexed to the land, but lies in grant, in which case the plaintiff must aver that

\* 2 Salk. 562. and see 3 Will. 72.

† 3 T. R. 151.

‡ Com. Dig. tit. *Pleader*, C. 66.

he, and his ancestors, have immemorially enjoyed it.

But in *personal* actions, it is seldom necessary to state a title specially in the declaration; for damages are the gist of these actions, and the title only matter of inducement<sup>v</sup>: And it is a general rule therein, that *possession is sufficient evidence of title against a wrong-doer*; as in trespass *quare clausum fregit*<sup>w</sup>, &c. So in an action on the case for a *nusance* to the plaintiff's house, &c. it is sufficient for the plaintiff in his declaration, to state generally that he was lawfully *possessed* of the house, or other property affected by the injury complained of: and if the declaration be for stopping up *lights*, it goes on to state, that by reason of his possession he had, and of right ought to have, the lights that have been obstructed<sup>x</sup>. In like manner, the plaintiff in an action for diverting a *watercourse* from his mill, need only state, that he was possessed of the mill, and that the water had been accustomed, and of right ought to flow thereto, without stating that it was an *ancient* mill, or disclosing the

<sup>v</sup> 10 Co. 59. b.

<sup>w</sup> 2 Bulst. 288.

<sup>x</sup> 1 Rol. Rep. 393:

<sup>y</sup> Cro. Car. 325. 1 Show.  
18.

grounds upon which the right to the water is claimed\*.

In an action upon the case for the *disturbance* of rights of *common*<sup>a</sup>, &c. there is this distinction: Where the action is brought against a *wrong-doer*, it is sufficient for the plaintiff to state in his declaration, that he was *possessed* of a house or lands, &c. and by reason of his possession thereof, was entitled to the right, in the exercise of which he has been disturbed: But where the plaintiff would lay any charge, or servitude on the land or property of another, he must set forth his title *specially* in the declaration<sup>b</sup>. So in an action on the case against a stranger and wrong-doer, for disturbing the plaintiff in the use of a *seat* in a church, no title or consideration is necessary to be shewn: But

<sup>a</sup> 1 Leon. 247. Palm. 290. 18. ; of *tolls*, Owen, 109. Cro. Car. 499, 575. 3 Mod. Cro. Jac. 43, 122, 3. 3  
48. 3 Lev. 133. S. C. Lev. 190. 2 Lutw. 1517. ;  
<sup>b</sup> 1 Vent. 319. 4 Mod. and of *seats* in churches,  
418. And for the manner of 1 Lev. 71. 1 Sid. 203.  
declaring for the disturbance S. C. 2 Lev. 193. 3 Lev.  
of *rights of way*, see 1 Vent. 73. 1 Will. 326. 1 T. R.  
274. 2 Lev. 148. 3 Keb. 428.  
528. 3 Lev. 266. 1 Lutw. <sup>b</sup> 4 Mod. 421. 1 Str. 5.  
120. ; of *offices*, 10 Co. 59. 1 Bur. 440. 4 T. R. 718.  
b. Cro. Eliz. 335. ; of *franchises*, 4 Mod. 423. 1 Show. but see 3 T. R. 768.

where



where the plaintiff claims against the ordinary himself, who hath *prima facie* the disposal of all the seats in the church, he ought to shew some cause or consideration, as building, repairing<sup>c</sup>, &c. And though, in the other case, the plaintiff is allowed to declare upon his possession, yet he must prove his title at the trial: And possession for above sixty years of a pew in a church, is not a sufficient title to maintain an action on the case, for disturbance in the enjoyment of it; but the plaintiff must prove a prescriptive right, or a faculty, and should claim it in his declaration, as appurtenant to a messuage in the parish<sup>d</sup>. In declaring for wrongs to *personal* property, the plaintiff must state his right; as in trespass for taking goods, that they were his own goods<sup>e</sup>; or in trover, that he was possessed of them, &c.

In actions upon the case for a breach of duty, the declaration should state the nature of the duty to be performed by the defendant, which is founded on the general obligation of law, the defendant's particular situation, or some con-

<sup>c</sup> 3 Lev. 73.

<sup>d</sup> 1 T. R. 428.

<sup>e</sup> Cro. Jac. 46. 2 Salk. 640.

1 Ld. Raym. 239. 2 Ld. Raym. 890. 2 Str. 1023.

tract or agreement between the parties. Where the defendant is liable of *common* right, as to repair a wall for preventing damage to his neighbour, it is not necessary for the plaintiff to shew a title in his declaration, or the special ground of the defendant's liability<sup>f</sup>: But where a charge is imposed on another, *against* common right, as owner of the soil or tertenant, it was formerly holden, that a title must be shewn, as in an action for not repairing fences<sup>g</sup>, &c. So where a special action on the case was brought against the defendant, for not keeping a bull and boar, the declaration was holden bad upon demurrer, for not setting forth that the defendant was obliged to keep them, either by custom, prescription, or otherwise<sup>h</sup>. But in a late case, where an action was brought for not repairing a private road, leading through the defendant's close, it was held to be sufficient to alledge, that the defendant, as *occupier* of the close, was bound to repair it<sup>i</sup>: And *per Buller* Justice, the distinction is, between cases where the plaintiff lays a charge upon the right of the defendant, and where the defendant himself prescribes in right of his own estate: In the former

<sup>f</sup> 1 Salk. 22, 360. 6 Mod.  
311. S. C.

<sup>h</sup> 4 Mod. 241.

<sup>i</sup> 3 T. R. 766.

<sup>g</sup> 1 Salk. 335, 6.

case, the plaintiff is presumed to be ignorant of the defendant's estate, and cannot therefore plead it; but in the latter, the defendant, knowing his own estate, in right of which he claims a privilege, must set it forth<sup>k</sup>. In actions against sheriffs or other officers, or against carriers, &c. for *mis-feasance*, the declaration must state the nature of the plaintiff's right, and the ground of the defendant's duty.

In actions upon the case for consequential injuries, the *damages* which the plaintiff has sustained, being the gist of the complaint, must be stated in the declaration; which damages must appear to depend on the injury complained of, and not be too *remote*, or happen from the intervention of another cause: And they are either *general* or *special*. *General* damages are such as naturally arise out of, or are connected with the injury complained of: And in actions for *mal-feasance*, they in general correspond with the end or design which the defendant had in view, and which has been previously stated in the declaration; as in an action for *defamation*, the declaration states, that the defendant intending to injure the plaintiff in his good name, &c. spoke

<sup>k</sup> 3 T. R. 768.

the words complained of; whereby the plaintiff was injured in his good name, &c. *Special damages* are either such as are superadded to general damages, arising from an act injurious in itself; or such as arise from an act indifferent in itself, but injurious in its consequences: And in either case, they must be specially laid in the declaration, or the plaintiff will not be allowed to give them in evidence at the trial. Thus in an action for defamation, though the words be in themselves actionable, yet the plaintiff is not at liberty to give evidence of any loss or injury he has sustained by the speaking of them, unless it be specially laid in the declaration<sup>1</sup>. If an action be brought for words that are not in themselves actionable, and the plaintiff do not prove the special damage laid in the declaration, he must be nonsuited, because the special damage is the gift of the action; but where the words are of themselves actionable, if the words be proved, the jury must find for the plaintiff, though no special damage be proved<sup>m</sup>.

The declaration in general concludes, to the *damage* of the plaintiff of a certain sum of money, *and therefore he brings his suit*, &c. But in a

<sup>1</sup> Bul. Ni. Pri. 7.

<sup>m</sup> Id. 6.

*penal* action, brought by a common informer, where the plaintiff's right to the penalty accrues upon bringing the action, it is not necessary to conclude in this way, as the plaintiff cannot have sustained any damage by a previous detention of the penalty<sup>n</sup>. And in actions against *attornies* and officers of the court, it is usual, though not necessary<sup>o</sup>, for the plaintiff, instead of bringing suit, to *pray relief*, &c. And where the action is brought by bill, against a *member* of the house of commons, the bill concludes with a prayer of process to be made to the plaintiff, according to the statute, &c. It was anciently necessary to find *pledges* to prosecute, and add their names to the declaration by *bill*<sup>p</sup>: But they are now holden to be mere matter of form, and may be found at any time before judgment<sup>q</sup>.

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The *Qualities* of a declaration are, first, that it correspond with the process; secondly, that it contain all the circumstances necessary to main-

<sup>n</sup> 4 Bur. 2021, 2490.

<sup>o</sup> Andr. 247.

<sup>p</sup> 9 Edw. IV. 27. Bro. Abr. tit. *Bill*, 15. tit. *Pledges*,

11. Dyer, 288.

<sup>q</sup> 18 Edw. IV. 9. 2 Hen.

VII. 1, 17. Palm. 518. Stat.

4 & 5 Ann. c. 16. § 1. Fort.

330. Cal. temp. Hardw. 315.

Barnes, 163. 1 Will. 226.

2 Will. 142, 3 T. R. 157.



tain the action, and no more; thirdly, that these circumstances be set forth with certainty and truth<sup>r</sup>.

The declaration should regularly correspond with the process, in the *names* of the parties; the description of the *character* in which they sue, or are sued; and, except on common process by *bill*, in the nature of the cause of action. But where process is taken out against a defendant by a *wrong* name, and he appears by his right name, the plaintiff may declare against him by the name in which he appears, stating that he was arrested, or served with process, by the other; for by appearing, the defendant admits himself to be the person sued, and so the variance is immaterial<sup>s</sup>. In such case, however, if the defendant do not appear, the plaintiff cannot rectify the mistake by appearing for him, in his *right* name, according to the statute<sup>t</sup>: Though if the plaintiff were to appear for the defendant in the name by which he is sued, it seems that this would warrant him in proceeding to judgment and execution<sup>u</sup>.

<sup>r</sup> Co. Lit. 303. a. Pl. M. 25 Geo. III. 3 T. R. Com. 84, 122. 611.

<sup>s</sup> *Green and Robinson, H.* <sup>t</sup> 3 T. R. 611.  
23 Geo. III. *Boyne v. Mills,* <sup>u</sup> 2 Str. 1218.

Upon

Upon *general* process, the plaintiff may declare *qui tam*, or as *executor* or *administrator*, &c. But this rule will not hold *à converso*; for where the process was to answer the plaintiff *qui tam*\*, &c. and the declaration was in his own name only, omitting the *qui tam* part, the court held the variance to be fatal, and set aside the proceedings†. In a subsequent case, the proceedings were set aside, where the process was to answer the plaintiffs as *assignees* of a bankrupt, and the declaration was in their own right; for the plaintiff cannot declare against the defendant generally, on process sued out in a special character‡.

The plaintiff may declare in chief, upon common process by *bill*, for any cause of action whatever§: And in *bailable* cases, the court will not permit a defendant to take advantage of a variance, in the amount of the debt, between the *ac-etiam* part of the *latitat* and the declaration¶. But where the plaintiffs, having held the defendant to bail on an affidavit in *assumpsit*, delivered a declaration in

\* 2 Str. 1232. 2 Blac. Rep. 722. 3 Wils. 141. S. C. signees of *Cochran, v. Ford*, E. 25 Geo. III.

† 4 Bur. 2417. 6 T. R. 158. § R. E. 15 Geo. II. Reg. 1. Cowp. 455.

‡ *Meggs* and another, af- § 5 T. R. 402.

*trover,*

*trover*, the court ordered an *exoneretur* to be entered on the bail-piece<sup>a</sup>. By *original*, the plaintiff must declare in chief, for the same cause of action as is expressed in the writ<sup>b</sup>. And if there be a variance between the original writ and declaration, the court will discharge the defendant, on entering a common appearance<sup>c</sup>: But they will not on this ground set aside the proceedings; for that would be permitting the defendant to do indirectly, what the practice of the court will not allow him to do directly, by cravingoyer of the original writ, and pleading the variance in abatement<sup>d</sup>.

The rules of pleading, as has been frequently observed, are founded in good sense; their objects are precision and brevity: nothing is more desirable for the court than precision, nor for the parties than brevity<sup>e</sup>. Precision or *certainly* is of three kinds; first, to a common intent; secondly, to a certain intent in general; thirdly, to a certain intent in

<sup>a</sup> 7 T. R. 80. and see 1 H. Blac. 310.

<sup>b</sup> 5 T. R. 402.

<sup>c</sup> 6 T. R. 363.

<sup>d</sup> *Id.* 2 Will. 393.

<sup>e</sup> Doug. 666, 7.

every particular<sup>f</sup>: The second, or that which is to a certain intent in general, is all that is required in a declaration; and it ought to be such, that the defendant may answer it, a good issue be joined thereon, and the court be enabled to give judgment<sup>g</sup>. This certainty ought to pervade the whole declaration; and is particularly required in setting forth the time, place, and other circumstances necessary to maintain the action<sup>h</sup>: But that which is alledged by way of conveyance or inducement to the substance of the matter, need not be so certainly alledged, as that which is the substance itself<sup>i</sup>; and *surplusage* will not vitiate, except where it defeats the action<sup>k</sup>.

If the declaration be defective in any of the above particulars, the defendant may demur: But if he do not, the defect may in some cases be aided, by the defendant's *plea*, or by a *verdict* for the plaintiff. If the declaration wants time, place, or other circumstances, it may be aided by the defendant's *plea*; but not if it be defec-

<sup>f</sup> Co. Lit. 303. a. and see C. 18, &c. And as to *time* Comp. 682. Doug. 158, 9. and *place*, see 5 T. R. 607.

<sup>g</sup> Co. Lit. 303. a. Pl. <sup>i</sup> Co. Lit. 303. a.

Com. 84.

<sup>h</sup> Com. Dig. tit. *Pleader*,

<sup>k</sup> Com. Dig. tit. *Pleader*, C. 28, 9.

tive in substance<sup>1</sup>: And a verdict will aid the omission of that, which was necessary to be proved at the trial, and without which the jury could not have found for the plaintiff<sup>a</sup>. Defects in the declaration are also frequently cured, by the statutes of *jeofails*<sup>a</sup>.

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The declaration itself was formerly delivered to the defendant's attorney, who made a copy of it, and then delivered it back<sup>o</sup>: But the copy is now made, on treble-penny stamped paper, by the plaintiff's attorney<sup>o</sup>; and either *delivered* to the defendant's attorney, or *filed* with the clerk of the declarations, in the King's Bench office. Where the defendant has appeared or filed bail, a copy of the declaration should be *delivered* to his attorney<sup>p</sup>, who should pay for the same, after the rate of *four-pence per sheet*,

<sup>1</sup> 8 Co. 120. b.

<sup>a</sup> Com. Dig. tit. *Pleader*, C. 87. and see Doug. 654.

7 T. R. 518.

<sup>o</sup> 22 Hen. VIII. c. 30.  
18 Eliz. c. 14. 21 Jac. I.  
c. 13. 16 & 17 Car. II. c. 8.

<sup>o</sup> R. T. 12 W. III.

<sup>p</sup> R. T. 2 Geo. II. But see 8 Mod. 379. and 2 Ld. Raym. 1407. by which this rule appears to have been made in T. 11 Geo. I. before the statute 13 Geo. I. c. 29. and the rule upon that statute, of T. 2 Geo. I.



computing seventy-two words to a sheet, together with the stamps or king's duty<sup>1</sup>; and *four-pence* for the warrant of attorney<sup>2</sup>: In such case, a delivery to the party himself is not good<sup>3</sup>. But where the defendant has not appeared or filed bail, or the defendant's attorney, or his clerk in his absence, refuses to pay for a copy of the declaration, or if the abode of the defendant's attorney be unknown to the plaintiff's attorney, the copy should be *filed*, with the clerk of the declarations, in the King's Bench office; and notice thereof given, without delay, to the defendant or his attorney<sup>4</sup>.

When the declaration is *delivered*, a notice to plead should be indorsed on it<sup>5</sup>: But when it is *filed*, the notice need not be indorsed<sup>6</sup>; but should be delivered to, or left at the last or most usual place of abode of the defendant, or his attorney; it being irregular for the plaintiff,

<sup>1</sup> R. T. 12 W. III. and R. 370.  
note (a).

<sup>2</sup> Lofft, 332.

<sup>3</sup> R. M. 5 Ann. Reg. 2.

<sup>4</sup> R. T. 12 W. III. R. T.

But the plaintiff cannot sign

2 Geo. II.

judgment, for the defendant's

<sup>5</sup> Append. Chap. XVII.

refusing to pay *four-pence* for

[A.]

the warrant of attorney, where

<sup>6</sup> Barnes, 226, 7. But see

the copy of the declaration

Barnes, 310.

is delivered to him. 4 T.

when the defendant's place of residence is known to him, to stick up a notice of declaration in the office<sup>w</sup>. And where an appearance is entered, or common bail filed by the plaintiff, according to the statute, the notice should express the nature of the action, at whose suit it is prosecuted, and the time limited by the rules of the court for pleading; and that in case the defendant do not plead by such limited time, judgment will be entered against him by default<sup>x</sup>.

If the declaration be *filed*, and notice thereof given to the defendant or his attorney, it is deemed to be a good declaration, from the time of such notice only<sup>y</sup>; and therefore a rule to plead in such case, given before notice of declaration, is irregular<sup>z</sup>. Yet, where the declaration was filed on the last day of the second term after the return of the writ, but the notice was not given till a little before the effoinday of the following term, this was holden to

<sup>w</sup> 7 T. R. 26.

Ld. Raym. 1407. 7 T. R.

<sup>x</sup> R. T. 1 Geo. II. And 298.

see Append. Chap. XVII.  
[B.]

<sup>y</sup> Pr. Reg. 131. Cal. Prac.

C. B. 111. Barnes, 248.

<sup>y</sup> R. T. 1 Geo. II. R. T. S. C.

<sup>z</sup> Geo. II. 8 Mod. 379. 2

be well enough; the master certifying it to be the practice<sup>a</sup>. The defendant must always receive and pay for a copy of the declaration, whether it be delivered or left in the office, before he can be admitted to plead<sup>b</sup>; and if he neglect to do so, the plaintiff's attorney may refuse to accept his plea, and sign judgment<sup>c</sup>.

Where the defendant has appeared or filed bail, or the plaintiff has entered an appearance, or filed bail for him, according to the statute, the declaration must be delivered or filed *absolutely*. But it cannot be so delivered or filed, *before* appearance or bail; as the defendant till then is not in court<sup>d</sup>: Still however, for the sake of expediting the cause, by making the times for appearance and pleading concurrent, it is provided, that "upon all process, return-  
"able before the *last* return of any term,  
"where no affidavit is made or filed of the  
"cause of action, the plaintiff *may*<sup>e</sup> file or  
"deliver the declaration *de bene esse*, or *con-*  
"ditionally, at the return of such process,

<sup>a</sup> 3 Bur. 1452. 2 T. R.

<sup>d</sup> Lofft, 333. 2 T. R. 719.

112.

<sup>e</sup> But he is not bound to

<sup>b</sup> R. T. 12 W. III. R. M.

do so. *Carmichael* against

<sup>c</sup> 10 Geo. II. Reg. 3.

*Troutbeck*, T. 24 Geo. III.

<sup>e</sup> 1 Will. 173.

*Ante*, 156.

“ with notice to plead in *eight* days, after  
“ the filing or delivery thereof; and if the  
“ defendant do not file common bail, and plead  
“ within the said eight days, the plaintiff, hav-  
“ ing first filed common bail for him, may  
“ sign judgment for want of a plea: And  
“ that upon all such process as aforesaid, where  
“ an affidavit is made and filed of the cause  
“ of action, the declaration may be filed or  
“ delivered *de bene esse*, at the return of such  
“ process, with notice to plead in *four* days  
“ after such filing or delivery, if the action  
“ be laid in *London* or *Middlesex*, and the  
“ defendant live within twenty miles of *Lon-*  
“ *don*; and in *eight* days, if the action be  
“ laid in any other county, or the defendant  
“ live above twenty miles from *London*; and  
“ if the defendant put in bail, and do not plead  
“ in due time, judgment may be signed:  
“ Provided the declaration, in either case, be  
“ filed or delivered, and notice thereof given,  
“ *four* days exclusive before the end of the  
“ term, and a rule to plead be duly en-  
“ tered<sup>f</sup>. ”

Upon process returnable the *last* return of  
the term, the declaration cannot be filed or

<sup>f</sup> R. T. 22 Geo. III. and see R. M. 10 Geo. II.

delivered

delivered *de bene esse*<sup>r</sup>; nor can it be so filed or delivered, upon process returnable on any other

<sup>r</sup> See the Rules of Mich. 10 Geo. II. and Trin. 22 Geo. III. It has been said by a modern writer, to whose labours the profession are greatly indebted, that the operation of these rules of court is not to confine declarations *de bene esse* to process returnable as therein mentioned, but only to regulate the time wherein defendant is to *plead* to such declarations on process so returnable: That the plaintiff may declare *de bene esse* upon any process whenever returnable; but if it be not returnable before the last return of the term, the notice to plead must not be in four or eight days, as mentioned in the rules (since those rules do not extend to such declarations *de bene esse*), but the defendant will, in that case, be entitled to an imparlance, and the notice should be to plead within the first four days of the next term. 1 *Sel. Pr.* 247, 3. And this idea is certainly sanctioned by the case of *Abbey v. Martin*, reported in 1 H. Blac. 533. But with great deference, I conceive that the declaration cannot regularly be filed or delivered *de bene esse*, unless the process be returnable before the *last* return of the term, for the following reasons; first, that at common law, a declaration could in no case have been filed or delivered, till the defendant had appeared, or was in custody; appearance being the first act of the defendant in court, and declaring against him the first act of the plaintiff, after appearance: See Com. Dig. tit. *Plader*, C. 1, 2, 3. Secondly, that the practice of declaring *de bene esse* seems to owe its origin to a series of rules, the first of which in this court was made in Michaelmas, 10 Geo. II.: At least, I have not been able to find any rule, or mention of such a practice in this court, previous to that time: Thirdly, that by those rules, the practice is expressly confined to process returnable before the *last* return of the



other return, *after* the defendant has appeared or filed bail<sup>a</sup>; or after the time for his appearance is expired<sup>b</sup>. Where the defendant has neglected to appear, or file *common* bail in due time, the plaintiff must enter an appearance, or file common bail for him, according to the statute; and then file or deliver his declaration *absolutely*: And where the neglect is of putting in or perfecting *special* bail, the plaintiff must proceed against the sheriff, or his bail upon the bail-bond.

If the plaintiff do not declare in due time, he is liable to be *nonpros'd*, or have judgment signed against him, for not prosecuting his suit<sup>c</sup>. But unless the defendant's attorney take advantage of the plaintiff's neglect, by signing a judgment of *nonpros*, the plaintiff may declare by *bill*, at any time within a year

term: And lastly, that the intent of them was to expedite the cause, by enabling the plaintiff in town, to proceed to trial at the sittings in or after the term in which the process is returnable, or in the country, at the next assizes: but this end could not be attained, unless the process were returnable before the last return; the defendant not being obliged to plead till the next term, unless the declaration be filed or delivered *de bene esse*, and notice thereof given, four days exclusive before the end of the term, and a rule to plead duly entered.

<sup>a</sup> 1 Bur. 56. Barnes, 342. Pr. Reg. 145, 6.

<sup>2</sup> T. R. 720. 6 T. R. 548. <sup>1</sup> Append. Chap. XVII. [C.]

next after return of the process<sup>k</sup>. The judgment of *nonpros*<sup>l</sup>, or *nonsuit*, for want of a declaration, is a final judgment, and signed with the clerk of the judgments, in the King's Bench office; an *incipitur* being first made on a roll, and on a sheet of paper, called a judgment-paper, stamped with a double half-crown stamp. In actions by *bill*, it is founded on the statute 13 Car. II. stat. 2. c. 2. § 3. by which it is enacted, that "upon an appearance entered for the defendant, by *attorney*, of the term wherein the process is returnable, unless the plaintiff shall put into the court from whence the process issued, his bill or declaration against the defendant, in some personal action or ejectment of farm, before the end of the term next following after appearance, a nonsuit for want of a declaration may be entered against him; and the defendant shall have judgment to recover costs against the plaintiff, to be taxed and levied in like manner as upon the

<sup>k</sup> 2 T. R. 112. 3 T. R. seems to be the proper appellation of the judgment, in actions by *bill*; but in actions by *original*, where the language of the judgment was *contra*.

<sup>l</sup> It is called a judgment of *nonprosequitur breve vel sec-tam*, it is more commonly called a judgment of *nonsuit*. *Ante*, 323, &c.

" 23 Hen.

"23 Hen. VIII<sup>m</sup>." The provisions of this statute are confined in terms, to cases where the defendant has been arrested; but it has been holden, that if a defendant appear at the day of the return of the process, and put in bail, though he never were arrested, nor the process returned, yet if the plaintiff do not declare within *two* terms, a *nonpros* may be entered against him<sup>a</sup>: And it is not confined to cases, where the writ is defective, but has always been construed to extend to cases in general<sup>o</sup>. Hence it is a rule, that on *all* process issuing out of this court, returnable at a day certain, if the defendant appear by his attorney, and file bail, of the term wherein the process is returnable, and the plaintiff do not declare before the end of the term next following, a *nonpros* may be signed, without entering any rule to declare, or calling for a declaration<sup>p</sup>. But a *nonpros* can never be signed, unless bail be filed as of the term wherein the process is returnable<sup>q</sup>; and therefore it cannot be signed, where a prisoner is superseded for not declaring, &c. on filing common bail<sup>r</sup>.

<sup>m</sup> Chap. 15.

2. (b). Gilb. K. B. 345.

<sup>n</sup> 2 Salk. 455. 7 Mod.

<sup>q</sup> *Holmes v. White*, E. 11

32. S. C.

Geo. III. *Ante*, 125.

<sup>o</sup> 7 T. R. 27.

<sup>r</sup> Imp. K. B. 415. 1 Crompt.

<sup>p</sup> R. M. 10 Geo. II. *Reg.* 127. 5 T. R. 35.

In a joint action, it is said, the plaintiff cannot be *nonpros'd* by one or more of the defendants, without the others<sup>\*</sup>. And this is universally true in actions by *original*, where the plaintiff cannot proceed against the defendants severally, upon a joint writ. But upon process in *trespass*, if the plaintiff declare, serve a notice of declaration, or even take out a rule for further time to declare, against one or more of several defendants, and do not proceed against the others, the latter may sign a judgment of *nonpros*<sup>†</sup>. In *trespass*, however, there ought to be but one judgment of *nonpros*, for all the defendants, unless the plaintiff have indicated his intention of proceeding against them severally; for the trespass is joint, and though the plaintiff may declare severally, yet it remains joint, till it be severed by the declaration<sup>‡</sup>.

Wherever the defendant obtains a judgment of *nonpros*, he is, as a necessary consequence, entitled to *costs*<sup>§</sup>; for which he may either take out execution, or bring an action of debt upon the judgment. It has even been holden, that

<sup>\*</sup> Doug. 169.

341. *contra*.

<sup>†</sup> 2 T. R. 257.

<sup>‡</sup> Stat. 23 Hen. VIII. c. 15.

<sup>§</sup> 2 Salk. 455. Com. Rep. 8 Eliz. c. 2. 4 Jac. I. c. 3.

74. S. C. 4 Bur. 2418. 13 Car. II. stat. 2. c. 2. 1  
Vin. Abr. tit. *Costs*, 4 V. T. R. 373.

an *executor* is liable to pay costs, upon a judgment of *nonpros*<sup>w</sup>. And the court, in two cases, have ordered the costs to be paid by the plaintiff's attorney; in one of them, at the instance of the *defendant*, upon an affidavit that the plaintiff could not be found<sup>a</sup>; and in the other, at the instance of the *plaintiff* himself, where his attorney refused to proceed, without being furnished with money<sup>y</sup>.

If the judgment of *nonpros* be *regular*, the court will not set it aside, as a matter of course; and in a *qui tam* action, they refused to do so<sup>z</sup>. But it may be set aside on motion, if *irregular*, with all the proceedings that have been had upon it: And if an action be brought on the judgment, the whole proceedings may be set aside by one rule<sup>a</sup>. A judgment of *nonpros* cannot regularly be signed, pending an injunction<sup>b</sup>. And where it was signed for not adjourning an *esso*, cast upon a special *capias*, and the plaintiff took no notice of it, but delivered his declaration, and after the rule to plead was out, and a plea called for, signed judgment; the court, considering it as a trick, declared that as there was no

<sup>w</sup> 3 Bur. 1584.

<sup>z</sup> 1 Str. 402.

<sup>y</sup> Say. Rep. 172.

<sup>z</sup> 1 Bur. 401.

<sup>a</sup> 4 T. R. 688.

<sup>b</sup> *Bowser v. Price*, E. 20  
Geo. III.



colour for the essoin, or to expect the plaintiff to search after a *nonpros*, and there was no notice given of it, the plaintiff was right to go on; and therefore they refused to set aside his judgment<sup>c</sup>.

<sup>c</sup> 2 Str. 1194.

## C H A P. XVIII.

*Of IMPARLANCE, and TIME for PLEADING; and of the RULE to plead, and DEMAND of a Plea, &c.*

THE plaintiff having declared, the defendant is allowed a certain time to prepare for his defence; and that either with, or without an imparlance.

*Imparlance* is said to be, when the court gives a party leave to answer at another time, without the assent of the other party<sup>a</sup>; and in this sense, it signifies time to reply, rejoin, surrejoin, &c. But the more common signification of imparlance is time to plead<sup>b</sup>; and it is either *general*<sup>c</sup>, without saving any exception to the defendant, which is always to another term<sup>d</sup>; or *special*, which is sometimes to another day in the same term<sup>e</sup>, with

<sup>a</sup> Com. Dig. tit. *Pleader*, Abr. 27, 8. 3 Blac. Com. D. 1. 301.

<sup>b</sup> 2 Mod. 62. 2 Show. <sup>d</sup> 6 Mod. 28.

310. Barnes, 346. <sup>e</sup> 6 Mod. 8. 10 Mod.

<sup>c</sup> Hardr. 365. 1 Lutw. 46. 127. Com. Dig. tit. *Pleader*, 12 Mod. 529. S. C. Gilb. D. 1.

C. P. 183, 211. 4 Bac.

a saving

a saving of all exceptions to the writ, bill, or count; or of all exceptions whatsoever: which latter is called a *general-special* imparlance. The *general* imparlance is of course, where the defendant is not bound to plead the same term; but a *special* imparlance is not allowed, without leave of the court<sup>f</sup>.

After a *general* imparlance, the defendant can only plead in *bar* of the action<sup>g</sup>; and cannot regularly plead to the *jurisdiction* of the court<sup>h</sup>, in *abatement*<sup>h</sup>, or a *tender* and *touts temps prist*. It is then also too late to claim *conusance*<sup>h</sup>, or demand *oyer* of a deed<sup>h</sup>, &c. After a *special* imparlance, the defendant may plead in *abatement*<sup>i</sup>, though not to the jurisdiction of the court. And where the defendant pleaded a *misnomer* in *abatement*, after an imparlance, thus; "And A B. who was arrested by the name of "A C. comes," &c. the court in one case held this to be tantamount to a *special* imparlance<sup>k</sup>: But this case has since been over-ruled, by a subsequent determination<sup>l</sup>. After a *general-special* imparlance, the defendant may not only plead in *abatement* of the writ, bill, or count,

<sup>f</sup> R. E. 5 Ann.

<sup>g</sup> 4 Bac. Abr. 29. Gilb. C. P. 184.

<sup>h</sup> *Vide post*, Chap. XXIII.

<sup>i</sup> 1 Lutw. 6.

<sup>k</sup> 1 Blac. Rep. 51. 1 Will. 261. S. C.

<sup>l</sup> 4 T. R. 520.

but

but also *privilege*<sup>m</sup>, which is a plea to the *person* of the defendant, affecting the *jurisdiction* of the court<sup>n</sup>. But he cannot plead a *tender* and *touts temps prist*, after any kind of imparlance<sup>o</sup>; for by craving time, he admits he is not ready, and so falsifies his plea. A *tender* must therefore be pleaded before imparlance, of the same term with the declaration; unless the declaration be delivered or filed so late, that the defendant is not obliged to plead to it that term: and then it may be pleaded of *course*, within the first four days inclusive of the next term<sup>p</sup>, or even afterwards, upon *motion*, as of the preceding term<sup>q</sup>.

If the defendant plead in abatement after a *general* imparlance, to the jurisdiction of the court after a *special* imparlance, or a *tender* after any kind of imparlance, the plaintiff may sign judgment<sup>r</sup>, or apply to the court by motion to set aside the plea<sup>s</sup>, or he may

- <sup>a</sup> 1 Lev. 54. Hardr. 365. 14. S. C. 1 Lutw. 238, 9.  
<sup>b</sup> Lutw. 46. 12 Mod. 529. R. E. 5 Ann. (a). R. T.  
 S. C. Gilb. C. P. 185, 211. 5 & 6 Geo. II. (b). But see  
<sup>c</sup> 5 Mod. 335. Dyer, 300.  
<sup>d</sup> 4 Bac. Abr. 28. Gilb. <sup>e</sup> 1 Bur. 59.  
 C. P. 184. Sty. P. R. 465. <sup>f</sup> Barnes, 343, 351, 355.  
<sup>g</sup> 2 Lil. P. R. 37. 1 Sid. 365. 357, 359, 361, 362.  
<sup>h</sup> 2 Mod. 62. 2 Salk. 622. 1 <sup>i</sup> 4 T. R. 520.  
 Ld. Raym. 254. Carth. 413, <sup>j</sup> 6 T. R. 373.

demur

demur thereto<sup>t</sup>, or alledge the imparlance in his replication, by way of *estoppel*<sup>u</sup>; but if the plaintiff, instead of demurring, or alledging the estoppel, reply to the special matter of the plea, the fault is cured<sup>v</sup>.

Formerly, the defendant had always an imparlance, to the term next after the return of the process, unless the proceedings were by *original*<sup>w</sup>, upon a *babeas corpus*, for or against *attornies* or other privileged persons, or against *prisoners* in custody of the marshal<sup>x</sup>. On proceedings by *original*, if the action were laid in *London* or *Middlesex*, and the defendant appeared before the *last* return of the term; or if the action were laid in any other county, and the defendant appeared the *first* return of *Hilary* or *Trinity* term, or before the *third* return of *Michaelmas* or *Easter* term; no imparlance was allowed, without consent or special rule<sup>y</sup>. So upon a *babeas corpus*, returnable in *Michaelmas* or *Easter* term, if the declaration were delivered

<sup>t</sup> Sty. P. R. 465. 3 *Inst.*      <sup>v</sup> 1 Vent. 236.

*Cler.* 40. 1 Will. 261. 1      <sup>w</sup> Skin. 2. but see 8 Mod.

*Blac. Rep.* 51. S. C. *Green v.* 228.

*Simmister, H.* 27 Geo. III.      <sup>x</sup> R. M. 5 Ann. III. (a).

6 T. R. 369.      *Gilb. K. B.* 310. *Gilb. C.*

<sup>y</sup> 1 Lutw. 23. 3 *Inst.* P. 43, 182. 4 Bac. Abr. 27.

*Cler.* 39.      <sup>z</sup> R. M. 1654. § 15.



before the *third* return, the defendant was not entitled to an imparlance<sup>a</sup>. And where the proceedings were for or against *attornies* or other privileged persons<sup>a</sup>, or against *prisoners* in custody of the marshal<sup>b</sup>, the defendant was bound to plead, without any imparlance, the same term the declaration was delivered, if delivered *four* days exclusive before the end of the term. Afterwards, when the clause of *ac-etiam* had been introduced into the bill of *Middlesex*, and other process in trespass, it became a rule, that where the cause of action was specially expressed in the process, the defendant should not have liberty of imparling, without leave of the court; but should plead within the time allowed, by the course of the court, to defendants sued by original writ<sup>b</sup>. And at length it was determined, that even upon a special *capias* by original, the defendant should not be obliged to plead, sooner than upon a common *latitat*<sup>c</sup>.

<sup>a</sup> 1 Mod. 1. 2 Salk. 515. § 3. (a). and see R. M. 1 Will. 154. and see 6 T. R. 5 Ann. III. (a).

752.

<sup>b</sup> R. H. 2 Geo. II.

<sup>a</sup> 2 Salk. 517. 6 Mod. 175. R. E. 5 W. & M. III.

<sup>c</sup> 1 Str. 684.

The former distinctions upon this subject being thus gradually abolished, it is now settled<sup>d</sup>, that in all cases, where the defendant has appeared, and filed common bail, or put in and perfected special bail, or the plaintiff has appeared and filed common bail for him, according to the statute, and the declaration is delivered, or filed and notice thereof given, four days *exclusive* before the end of the term in which the writ was returnable; if the venue be laid in *London* or *Middlesex*, and the defendant live within twenty miles of *London*, the declaration should be delivered or filed *absolutely*, with notice to plead within *four* days; or in case the action be laid in any other county, or the defendant live above twenty miles from *London*, within *eight* days *exclusive*<sup>e</sup> after the delivery or filing thereof: and the defendant must plead accordingly, without any imparlance; or in default thereof, the plaintiff may sign judgment. If the declaration be delivered or filed, with notice to plead within the *first* four days of term, the defendant has all the morning of the *fifth* day to plead; and judgment cannot be signed, for want of a plea, till the opening of the office, in the afternoon of that

<sup>d</sup> R. T. 5 & 6 Geo. II.<sup>e</sup> *Id.* (a).

day<sup>f</sup>: But in any other part of the term, if the defendant do not plead within the four days, the plaintiff may sign judgment, in the morning of the fifth day<sup>f</sup>. And if a plea be not put in on the day the rule expires, and the other party do not take advantage of it immediately, the defendant may deliver his plea, at any time before judgment is actually signed against him<sup>g</sup>.

Where the defendant has not appeared, or filed bail, the rule<sup>h</sup> is, that “ upon all proceſs  
“ returnable before the *laſt* return of any term,  
“ where no affidavit is made and filed of the  
“ cauſe of action, the plaintiff may file or de-  
“ liver the declaration *de bene eſſe*, at the return  
“ of ſuch proceſs, with notice to plead in *eight*  
“ days *excluſive*<sup>i</sup>, after the filing or delivery  
“ thereof;” being the ſame time as is allowed  
for the defendant to appear and file common  
bail<sup>k</sup>: and “ if the defendant do not file com-  
“ mon bail, and plead within the ſaid eight  
“ days, the plaintiff, having filed common bail  
“ for him, may ſign judgment for want of a  
“ plea<sup>h</sup>.” But if the declaration be not filed,

<sup>f</sup> *Shephard v. Mackreth*, E. ſee the former rule of M.  
35 Geo. III. K. B. 10 Geo. II. Reg. 2.

<sup>g</sup> 1 T. R. 16. 4 T. R. <sup>i</sup> *Id.* (a).

195, 6. 5 T. R. 35. <sup>k</sup> *Ante*, 122, 3.

<sup>h</sup> R. T. 22 Geo. III. and

until *after* the return of the process, the defendant has *eight* days to plead, from the time of filing it, whenever it may be<sup>1</sup>. And “upon all such process, where an affidavit is made and filed of the cause of action, the declaration may be filed or delivered *de bene esse*, at the return of such process, with notice to plead in *four* days after the filing or delivery, if the action be laid in *London* or *Middlesex*, and the defendant live within twenty miles of *London*, and in *eight* days, if the action be laid in any other county, or the defendant live above twenty miles from *London*;<sup>2</sup>” being the same time as is allowed for pleading, where the declaration is delivered or filed *absolutely*<sup>3</sup>: and, “if the defendant put in bail, and do not plead within such times as are respectively before-mentioned, judgment may be signed<sup>4</sup>.” But in all the foregoing cases, the declaration should be delivered, or filed and notice thereof given, *four* days *exclusive* before the end of the term, a rule to plead duly entered, and a plea demanded, when necessary<sup>5</sup>. If the defendant plead, before the

<sup>1</sup> 1 Bur. 56. *Delatre* and

*Mango*, M. 20 Geo. III.

<sup>2</sup> *Ante*, 387.

<sup>3</sup> R. T. 5 & 6 Geo. II.

(b). R. M. 10 Geo. II.

*Reg.* 2. R. T. 22 Geo. III.

bail are perfected, his plea will be considered as a nullity \*.

Where the process is returnable the *last* return of the term<sup>a</sup>, or where it is returnable before, but the declaration is not delivered, or filed and notice thereof given, *four* days *exclusive* before the end of the term<sup>a</sup>, the defendant, if completely in court, is entitled to an imparlance; and must plead within the first *four* days of the next term, provided the declaration be delivered, or filed and notice thereof given, before the effoin-day of that term: otherwise the defendant will be allowed to imparl to the subsequent term<sup>a</sup>. But if a writ be returnable the last day of one term, and the defendant does not justify bail until the fourth day of the next, he is not entitled to an imparlance to the third term, though the plaintiff do not declare *de bene esse* before the effoin-day of the second; the foundation of which is, that no laches can be imputed to the plaintiff, for not declaring until the defendant is perfectly in court<sup>a</sup>. And for the like reason, if a writ be taken out against two

\* 4 T. R. 578.

<sup>a</sup> Vidian's *Introd.* II.

<sup>a</sup> R. T. 5 & 6 Geo. II. (b).

<sup>a</sup> 5 T. R. 372.



defendants, and one of them is arrested, or served with a copy of it, in the term of which it is returnable, but the other cannot be met with, so that it becomes necessary to take out another writ against him, returnable in the next term; as the plaintiff cannot declare till both defendants are in court, they are neither of them entitled to an imparlance, on account of the plaintiff's not declaring until the term in which the latter defendant is arrested, or served with process'. So when a defendant removes the cause by *habeas corpus* from an inferior court, and the plaintiff does not declare until the next term, the defendant is not entitled to an imparlance; for such removals being in general considered as dilatory, it would only be adding to the delay, if an imparlance were granted'.

If four terms have elapsed, since the delivery or filing of the declaration, the defendant shall have a whole term's notice to plead, before judgment can be entered against him', unless the cause have been stayed by *injunction*<sup>u</sup>, or privilege; and the notice in such case must be

<sup>s</sup> 6 T. R. 752.

<sup>u</sup> *Id. ibid.* 2 Bur. 660.

<sup>t</sup> R. T. 5 & 6 Geo. II. Doug. 71. 2 Blac. Rep. 784.

(b).

given before the effoin-day of the term<sup>v</sup>: but it does not extend beyond the term; and therefore a rule to plead may be entered, and judgment signed, in the vacation<sup>v</sup>. This rule was established, for the purpose of preventing any surprise on the defendant, after the plaintiff has lain by four terms, without proceeding in his action; and therefore it does not apply, where the proceedings have been delayed at the defendant's request<sup>z</sup>.

It remains to be observed, within what time the defendant must plead after changing the *venue*, demanding *oyer*, or *amending* the declaration. After changing the *venue*, the defendant must plead to the new action, as he should have done in the other, without delay<sup>v</sup>. After the delivery of *oyer*, the defendant shall have the same time to plead, as he had when he demanded it<sup>z</sup>. And if the plaintiff *amend* his declaration, the defendant shall have *two* days, exclusive of the day of amendment, to alter his first plea, or plead *de novo*<sup>z</sup>.

<sup>v</sup> 2 Str. 1164. 1 Str. 211.

<sup>v</sup> R. M. 1654. § 5.

*contra.*

<sup>z</sup> R. T. 5 & 6 Geo. II.

<sup>w</sup> 2 T. R. 40.

(*b*). 1 Str. 705.

<sup>z</sup> 3 T. R. 530. and see

<sup>z</sup> *Id.* and see R. M. 10

2 Blac. Rep. 762.

Geo. II. Reg. 2. (*b*).

If the defendant be not prepared to plead, by the expiration of the time allowed him for that purpose, his attorney or agent should take out a *summons*, and serve it upon the plaintiff's attorney or agent<sup>b</sup>, requiring him to attend a judge, and shew cause why the defendant should not have further time to plead: And in *trover* for goods, where the defence was that they had been sold by the plaintiff, the court gave the defendant time to plead, in order that he might obtain a discovery from the court of chancery<sup>c</sup>. When the summons is taken out, and made returnable, before the expiration of the time for pleading, it is a stay of proceedings, pending the application<sup>d</sup>; but it is otherwise when taken out, or made returnable, after the expiration of the time for pleading<sup>d</sup>: nor will it operate as a stay of proceedings, where the object of it is collateral to the time for pleading<sup>e</sup>, as to discharge the defendant out of custody upon common bail, &c.

The plaintiff's attorney or agent, on being served with the summons, either indorses his

<sup>b</sup> *Ante*, 246.

<sup>c</sup> 2 T. R. 683.

<sup>d</sup> Say. Rep. 165. Barnes, 240, 252. Caf. Prac. C. B. 137. Pr. Reg. 292. S. C.

Barnes, 255. Caf. Prac. C. B.

144. S. C. Barnes, 254.

Pr. Reg. 293. S. C.

<sup>e</sup> *Per Cur.* M. 28 Geo. III.

consent

consent to an order being made upon it, attends the judge, or makes default. In the latter case, the defendant's attorney or agent, after waiting *half* an hour<sup>f</sup>, should take out a *second* summons, and after that a *third* (if necessary), which should be respectively served and attended as the first; And if default be made upon three summonses, the judge, on affidavit thereof, will make an order *ex parte*. But if any one of the summonses be attended, the judge will make an order upon, or discharge it, as he sees cause; and if he make an order for a month's time to plead, it is understood to mean a *lunar*, and not a *calendar*, month<sup>g</sup>.

The order of a judge for time to plead, must be served in like manner as the summons: And it is either upon, or without terms. The usual terms are pleading *issuably*, rejoining *gratis*, and taking *short* notice of trial, or inquiry: And where the defendant is an *executor* or *administrator*, he must undertake not to plead any judgment obtained against him, since his time for pleading was out<sup>h</sup>; for otherwise he might con-

<sup>f</sup> R. T. 35 Geo. III. 6 Rep. 450. S. C.

T. R. 402.

<sup>h</sup> 8 Mod. 308. and see

<sup>g</sup> 3 Bur. 1455. 1 Blac. 1 Bullst. 122, 3.

self judgments in the mean time, and plead them in bar to the plaintiff's demand.

An *issuable* plea is a plea *in chief* to the merits<sup>1</sup>, upon which the plaintiff may take issue, and go to trial<sup>2</sup>: Therefore, a plea in abatement is not an issuable plea<sup>3</sup>; nor a false plea of judgment recovered<sup>4</sup>, or other plea which does not go to the merits<sup>5</sup>: But a plea of tender has been deemed an issuable plea<sup>6</sup>, and also a plea of the statute of limitations<sup>7</sup>, or that a bail-bond was taken for ease and favour<sup>8</sup>. As to *demurrers*, there is a distinction between a real and fair demurrer, and a demurrer without good cause<sup>9</sup>: The former is an issuable plea, within the meaning of a judge's order<sup>10</sup>; the latter is not, but only an evasion of it<sup>11</sup>. By rejoining *gratis* is meant, rejoining without the common four-day rule to rejoin<sup>12</sup>. *Short* notice of trial, in *country* causes, must be given at least

<sup>1</sup> 7 T.R. 530. Barnes, 263. Rep. 35. 2 T. R. 390.

<sup>2</sup> 2 Bur. 782. *contra*.

<sup>3</sup> 1 Bur. 59. Barnes, 263. <sup>4</sup> 1 Bur. 605.

<sup>5</sup> 1 Blac. Rep. 376. <sup>6</sup> 3 Bur. 1788, 9.

<sup>7</sup> *Valle v. Gardiner*, H. <sup>8</sup> 2 Str. 1185.

<sup>9</sup> 24 Geo. III. *Gillett and Ridley*, C. B. <sup>10</sup> Say. Rep. 88. 7 T. R. 530. *Gillett and Ridley*, C. B.

<sup>11</sup> 1 Bur. 59. Barnes, 263. <sup>12</sup> Barnes, 271.

T. R. 124. 1 Blac.

*four*



*four* days before the commission-day, one day exclusive, and the other inclusive<sup>v</sup>: In *town* causes, *two* days notice seems to be sufficient<sup>w</sup>; but it is usual to give as much more, as the time will admit of: The defendant, however, is not precluded, by these terms, from demurring to the replication, if there be good cause<sup>x</sup>.

Where the defendant is under a judge's order to plead *issuably*, and pleads a plea which is not *issuable*, the plaintiff may consider it as a mere nullity, and sign judgment<sup>y</sup>: And where several pleas are pleaded, one of which is not *issuable*, it will vitiate all the others<sup>z</sup>: But where it is doubtful whether the plea be *issuable*, the better way, in term-time, is to move the court to set it aside<sup>a</sup>.

If a defendant be bound by rule of court, or order of a judge, to plead by a time therein limited, it is incumbent on him to do so, although the plaintiff do not enter any rule to

<sup>v</sup> R. E. 30 Geo. III.

<sup>3</sup> T. R. 660.

<sup>w</sup> Pr. Reg. 390.

<sup>x</sup> R. T. 5 & 6 Geo. II. (*b*).

<sup>2</sup> Str. 1185.

<sup>y</sup> *Valle v. Gardiner*, H.

<sup>24</sup> Geo. III.

<sup>z</sup> 3 T. R. 305.

<sup>a</sup> 1 Bur. 59. 2 T. R. 390.

plead,

plead, or call for a plea<sup>b</sup>. With this exception, the plaintiff must in all cases enter a rule to plead, whether the defendant have appeared or not; and where the defendant has appeared, he must also demand a plea, before he can sign judgment.

The *rule* to plead is the order of the court<sup>c</sup>; and may be entered; with the clerk of the rules, at any time after the delivery, or filing and notice, of the declaration, in term-time; or if the declaration be delivered, or filed and notice given, four days exclusive before the end of the term, the rule to plead may be entered at any time during the first four days after term<sup>d</sup>: The clerk of the rules will accept a rule to plead on the effoin-day, but such rule cannot be entered until the first day of term<sup>e</sup>: And *Sunday* is a day within this rule, unless it be the last<sup>f</sup>. Anciently there were two rules given, of *four* days each; the first *ad respondendum*, the second *ad respondendum peremptoriè*<sup>g</sup>. These were afterwards converted into one *eight*-day rule<sup>h</sup>: but now, “*four* days  
“ only shall be allowed the defendant, from the

<sup>b</sup> R. T. 5 & 6 Geo. II.  
(b). Pr. Reg. 290, 291.  
Caf. Prac. C. B. 67, 141.  
S. C.

<sup>d</sup> Imp. K. B. 232.

<sup>e</sup> *Id. ibid.*

<sup>f</sup> 2 Salk. 624. 1 Str. 86.

<sup>g</sup> Vidian's *Introd.* II. 2

<sup>c</sup> Append. Chap. XVIII. Salk. 517.

[A.]

<sup>h</sup> 2 Salk. 517.

“ time

"time of giving any rule to plead<sup>1</sup>;" which four days expire before, with, or after the time for pleading. If they expire before, the plaintiff must wait till the expiration of the time for pleading, before he can sign judgment for want of a plea: But if they expire with or after that time, "the plaintiff is at liberty to sign his judgment, the day after the rule for pleading is out; the declaration having been regularly delivered or filed, and the defendant or his agent being called upon for a plea<sup>k</sup>."

When a rule to plead has been once entered, and the cause stands over to another term, without any further proceeding, a new rule to plead should regularly be entered in that term, to entitle the plaintiff to sign judgment; for all judgments must be entered, the same term in which rules are given<sup>l</sup>. Where the declaration is *amended*, if a rule to plead be entered the same term the amendment is made, though before such amendment, it is sufficient<sup>m</sup>; otherwise a new rule to plead must be entered. And where the plaintiff, after giving a rule to plead,

<sup>1</sup> R. T. 1 Geo. II. 2 Str. 1192.      <sup>m</sup> 2 Salk. 517, 18, 20. R. M. 10 Geo. II. Reg. 2. (b).  
<sup>k</sup> R. H. 2 Geo. II. Reg. 3.      *Yates v. Edmonds*, T. 35 Geo. III.      *Gilb. K. B.* 318.

has been delayed by *injunction*, he may sign judgment after the injunction is dissolved, without a new rule<sup>n</sup>.

The *demand* of plea is a notice in writing from the plaintiff's attorney<sup>o</sup>; and, except where the defendant is in custody of the *sheriff*<sup>r</sup>, &c. must be made in every case where the defendant has appeared<sup>s</sup>, or filed common bail: And it may be made at the time of delivering the declaration<sup>t</sup>. But before the defendant has appeared<sup>s</sup>, or after the plaintiff has entered an appearance, or filed common bail for him, according to the statute<sup>t</sup>, or where the defendant is in custody of the sheriff<sup>u</sup>, &c. the demand of a plea is unnecessary. The plaintiff cannot sign judgment for want of a plea, till the expiration of twenty-four hours after it has been demanded, whether the time for pleading be or be not expired, when such demand is made<sup>v</sup>: And if a plea be demanded

|                                      |                                       |
|--------------------------------------|---------------------------------------|
| <sup>n</sup> 2 Bur. 660. Doug. 71.   | <sup>r</sup> 6 T. R. 689.             |
| <sup>2</sup> Blac. Rep. 784. Barnes, | <sup>s</sup> 1 T. R. 635.             |
| 238.                                 | <sup>t</sup> R. T. 1 Geo. II. Barnes, |
| <sup>o</sup> Append. Chap. XVIII.    | 249.                                  |
| [B.]                                 | <sup>u</sup> 1 T. R. 591. 6 T. R.     |
| <sup>p</sup> 1 T. R. 591. 6 T. R.    | 525.                                  |
| 525.                                 | <sup>v</sup> 1 Blac. Rep. 50. 1 T. R. |
| <sup>q</sup> 1 Willf. 134.           | 454. 4 T. R. 118.                     |

on a *Saturday*, the defendant has twenty-four hours to plead, after the demand, exclusive of *Sunday*<sup>w</sup>. But judgment may be signed at any time after the twenty-four hours are expired, provided the time for pleading be then out; and therefore if the plea be demanded in the *morning*, the plaintiff is not obliged to wait until the opening of the office, in the *afternoon* of the following day<sup>x</sup>.

<sup>w</sup> 4 T. R. 557.

<sup>x</sup> 1 T. R. 454.



## CHAP. XIX.

Of MOTIONS and RULES; and the *Prac-*  
*tice by SUMMONS and ORDER.*

As it is frequently necessary, in the course of a suit, to apply to the court, it may be proper, before we proceed further, to say somewhat of *motions*, and of the *rules* or *orders* of the court thereon.

A *motion* is an application for a rule or order of the court; and it is either for a rule *absolute* in the first instance, which is sometimes moved for in court, and sometimes drawn up on a motion-paper signed by counsel, and delivered to the clerk of the rules; or it is only for a rule to shew cause, or as it is commonly called a rule *nisi*, unless cause be shewn to the contrary; which is afterwards moved to be made absolute.

*Rules* are of three kinds; first, such as are issued by the clerk of the rules, as a matter of course, on a *præcipe* or note of instructions made out by the attornies who apply for them; and

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are

are not founded on any motion, either real or supposed: Of this kind are rules to plead, and rules for judgment on *posseas*, or writs of *scire facias*. Secondly, such as were anciently moved for by the attornies at side-bar, and are thence called side-bar rules: Of this nature are the rules for time, or further time to declare; for the sheriff to return the writ, or bring in the body; to be present at taxing costs; to discontinue; or for a *scire facias* to revive a judgment under ten, and above seven years old, &c. These rules may be had at the office of the clerk of the rules, at any time either in term or vacation. Thirdly, such rules as are, or are supposed to be moved in court; which are either common or special.

Motions and rules are of a *civil* or *criminal* nature. Of the latter kind is the rule for an *attachment*, which may be moved for on account of contemptuous words, spoken of the court (*a*), or its process (*n*); for a *reseue* (*n*), or disobedience

<sup>a</sup> R. T. 17 G. III. N.B. In classing the different motions, the letter (*a*) is used to denote that the rule is *absolute* in the first instance; the letter (*r*) that it is drawn up on

the *signature* of counsel; the letter (*c*) that it cannot be had without *consent*; and the letter (*n*) that in the first instance, it is only a rule *nisi*.

ence

thence to a *subpoena* (n), or other process (n); against the sheriff, for not obeying a peremptory rule to return a writ (a)<sup>b</sup>, or to bring in the body (a); against an attorney, for not performing his undertaking (n); or otherwise misbehaving himself (n)<sup>c</sup>; and against other persons, for nonpayment of costs, on the master's *allocatur* (a), or not performing an award, &c. (n). The rule for an attachment for non-payment of costs, on the master's *allocatur*, is absolute in the first instance, unless it be for costs in pursuance of an award<sup>d</sup>; but where it is for the nonpayment of money generally, or of money and costs, it is only a rule to shew cause<sup>e</sup>.

Motions and rules of a *civil* nature, where an action is depending, are made on behalf of the *plaintiff*, or of the *defendant*. On behalf of the *plaintiff*, they are either for something to be done, in the common and ordinary course of the suit, as to increase issues (a), for a *concilium* (s), or judgment (a), on demurrer, special verdict, or a writ of error; for leave to enter up judgment on an old warrant of attorney<sup>f</sup>, or *nunc pro tunc* (n);

to

<sup>b</sup> R. T. 17 G. III.

<sup>c</sup> *Ante*, 257.

<sup>d</sup> *Thompson v. Billing*,  
T. 37 G. III.

<sup>e</sup> *Per Buller*, Justice, M.

24 G. III.

<sup>f</sup> This rule is absolute in the first instance, unless the

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bond

to enter up judgment and take out execution, after a verdict for the plaintiff, against one of several underwriters, where the rest have agreed to be bound by it (*n*); for a *scire facias*, to revive an old judgment<sup>2</sup>; or to take out ex-

bond be above *twenty* years old, and then it is a rule *nisi*; but where, upon such a bond, the party had admitted the debt within two months preceding the motion, the court granted it absolute in the first instance. *Blakely v. Vincent*, T. 35 G. III. If the warrant of attorney be not above *ten* years old, an application may be made to a judge in vacation, for leave to enter up the judgment, on an affidavit of the due execution of the warrant of attorney, that the debt or part of it is still due, and that the parties are living. Imp. K. B. 410. But in this case, it seems that the affidavit ought to be filed with the clerk of the rules. And in general, when a rule of the court may be obtained, as a matter of course, a judge's order should not be resorted to, for the following reasons; first, that a judge's order paying no stamp duty, the revenue sustains a loss;

secondly, that a judge's chambers are not an office of record, for filing or preserving affidavits; and thirdly, that the practice or mode of proceeding by judge's order, instead of side-bar or common rule, is generally more expensive to the suitors.

\* If the judgment be under *seven* years old, the plaintiff may sue out a *scire facias*, as a matter of course, without any rule or motion: If it be above *seven* years, but under *ten*, he cannot have a *scire facias*, without a side-bar rule. 2 Salk. 598. If it be above *ten* years old, but under *twenty*, there must be a motion under counsel's hand, supported by an affidavit that the judgment is unsatisfied: *Id.* And if the judgment be of more than *twenty* years standing, there must be a rule to shew cause, on a similar affidavit. *Blakely v. Vincent*, T. 35 G. III. *Waters v. Hales*, E. 37 G. III.

ecution

execution pending a writ of error, &c. (*n*); to amend the pleadings, or other proceedings in the course of the suit (*n*); or to set aside a judgment of *non pros* (*n*), non-suit (*n*), verdict (*n*), or inquisition (*n*): Or they are for something to be done, out of the common and ordinary course of the suit, as for the defendant to abide by his plea (*s*), to refer it to the master to assess the damages, without a writ of inquiry (*n*), for the execution of a writ of inquiry before a judge (*n*), or to have a good jury upon the execution of such writ (*a*); for a trial at bar (*n*), or in an adjoining county (*n*); for a view (*s*)<sup>h</sup>, or special jury (*s*); to have witnesses examined on interrogatories (*c*); or for leave to inspect and take copies of books, court rolls<sup>1</sup>, &c. or to have them produced at the trial (*n*). So the plaintiff may have a rule *nisi*, for the defendant to produce a deed before the commissioners of the stamp-office, to be stamped; and also to give

<sup>h</sup> In *trespass*, the rule for a view is drawn up on a motion-paper signed by counsel; but in other actions, it is moved for in court, and in some cases is only a rule to shew cause.

<sup>1</sup> If the rule be moved for on behalf of the tenant of the manor, it is absolute in the first instance, on the signature of counsel; 3 T. R. 141. otherwise it is a rule to shew cause.



the plaintiff a copy of the deed, in order that he may declare thereon<sup>k</sup>.

On behalf of the *defendant*, motions may be considered as they arise, and succeed one another, in the course of the suit. In general, they are to quash the writ (*n*), justify bail (*a*), reverse an outlawry (*n*), or, after several rules for time to declare, that the plaintiff declare peremptorily (*a*): to set aside an interlocutory judgment, or other proceedings for *irregularity* (*n*), and if the defendant be a prisoner, to discharge him out of custody upon common bail (*n*); or if they are *regular*, to set aside the judgment upon an affidavit of merits (*n*), or to stay the proceedings upon terms, in actions upon bail-bonds (*n*)<sup>l</sup>, or in other actions, where the debt sued for appears to be under forty shillings (*n*), or the action is brought or conducted upon bad or defective grounds (*n*), contrary to good faith (*n*), or without proper authority (*n*); or that they may be stayed, pending a writ of error (*n*),

<sup>k</sup> *Cooke v. Stocks*, M. 36 G. III.      tion; and one rule in such case seems to be sufficient. *Nick-*

<sup>l</sup> One motion may be made, in the *original* action, to stay all the proceedings on the bail-bond given in that ac-      *lin v. Profit*, *Same v. Taylor*, and *Same v. Burley*, H. 37 G. III.

until

until security be given for the payment of costs (*n*), or until the costs are paid of a former action for the same cause (*n*): to compound penal actions (*c*), change the venue (*a*)<sup>m</sup>, consolidate actions (*n*), or strike out superfluous or unnecessary counts (*n*); for time to plead, or reply, &c. under special circumstances (*n*); to plead several matters (*s*), or pay money into court (*s*); to withdraw the general issue, and plead it *de novo*, with a notice of set-off (*a*), or upon paying money into court (*a*); to add or withdraw special pleas (*a*)<sup>n</sup>; to put off a trial, if the defendant is not ready (*n*), or if the plaintiff will not proceed, for costs for not proceeding to trial (*a*), or inquiry (*a*), or for judgment as in case of a non-suit (*n*); in arrest of judgment (*n*); or for a suggestion, upon the *Welsh* judicature act, to entitle the defendant to a judgment of non-suit (*n*)<sup>n</sup>, or after a non-suit or verdict, to entitle him to double or treble costs<sup>p</sup>, &c. (*n*); to set aside an execution, and discharge the defendant, or re-

<sup>m</sup> The rule to change the venue into an *English* county, absolute in the first instance, as being next adjoining to a *Welsh* county, is a rule *nisi*. the rule, though commonly absolute in the first instance, is sometimes only to shew cause.

*Powell v. Wilkins*, 4 M. 37 G.

<sup>o</sup> 6 T. R. 500.

III. *Anon.* H. 37 G. III.

<sup>p</sup> *Prichard v. Peacock*, E.

<sup>n</sup> In the three last cases, 35 G. III.

store to him the money levied, or to retain it in the sheriff's hands (*n*).

The defendant also, as well as the plaintiff, may move for a *concilium* (*s*), or judgment (*a*), on demurrer, special verdict, or a writ of error; to amend (*n*); for a trial at bar (*n*), or in an adjoining county (*n*); for a view (*s*), or special jury (*s*); to have witnesses examined on interrogatories (*c*), or for leave to inspect and take copies of books, court rolls<sup>a</sup>, &c., or have them produced at the trial (*n*); or to set aside a verdict (*n*), or inquisition (*n*). Either party may likewise move to make a judge's order, submission to arbitration, or order of *nisi prius*, a rule of court (*a*); to enlarge the time for making an award (*c*); to set aside an award (*n*), or judge's order (*n*); or for the master to make his report (*a*), or review his taxation (*n*).

There are some motions peculiar to the action of *ejectment*, such as for judgment against the casual ejector (*s*), or that service on the tenant's son or daughter, &c. may be deemed good service (*n*); for the landlord to be admitted defendant, instead of the tenant (*s*), or for leave to take out execution, in such case, against the casual ejector, after the landlord has failed in his

<sup>a</sup> *Ante*, 405. in notes.

defence.

defence (n). The motion for judgment against the casual ejector is founded on an affidavit of the service of the declaration in ejectment, which should regularly be served on the tenant or his wife; it having been holden, that an affidavit of its being left with a servant, (the tenant and his wife being out of the way,) is not sufficient<sup>1</sup>. The tenant himself may be served any where; but it must appear that he is *tenant*, an affidavit of service on the *person* in possession of the premises being insufficient<sup>2</sup>. A declaration in ejectment may be served on the wife, either on the premises, or at the husband's house; and the reason why it is necessary to state in the affidavit, that the service was on the wife, at the husband's house, is to shew that they were living together as man and wife, and that by such service the husband may have notice of the proceedings<sup>3</sup>. If the tenant or his wife refuse to receive the declaration, a copy of it should be left for them, or fixed on the premises: and if the tenant absconds, or keeps out of the way, to avoid being served, a copy of the declaration should be delivered to one of his family; or if there be no

<sup>1</sup> Per Lord Kenyon, M. Roe, T. 35 G. III.

38 G. III.

<sup>2</sup> 6 T. R. 765.

<sup>3</sup> Doe, ex dem. Robinson v.

one in possession, it should be affixed on some conspicuous part of the premises.

Where there is any thing in the service of the declaration out of the common way, it should be mentioned to the court, on moving for judgment against the casual ejector; and if they are satisfied that the tenant has had notice of the declaration, they will make the rule for judgment absolute in the first instance; but otherwise they will grant a rule upon the tenant to shew cause, why the service should not, under the special circumstances, be deemed sufficient, and direct that service of the rule on the premises shall be good service<sup>u</sup>. If the affidavit of service of a declaration in ejectment be defective, the court will give leave to file a supplemental affidavit<sup>v</sup>. And in certain cases, they will permit an amendment to be made in the notice, at the bottom of a declaration in ejectment<sup>w</sup>. Where there are several tenants, only one rule is necessary, on a motion for judgment against the casual ejector; though the name of each tenant was separately prefixed to the notice served on him<sup>x</sup>.

<sup>u</sup> 1 Str. 575. 2 Burr. 1116, *Roe*, T. 35 G. III.  
<sup>v</sup> 1181. 1 Blac. Rep. 290, 317. <sup>w</sup> 7 T. R. 469.  
<sup>x</sup> *Doe ex dem. Robinson v.* <sup>x</sup> *Id.* 477.



There are other motions, not necessarily connected with any action, as to set aside an *annuity* (*n*), and deliver up the securities to be cancelled, &c. By the annuity act, 17 Geo. III. c. 26. § 4. the court in which any action is brought for payment of the annuity, or judgment entered, have in certain cases, an *express* jurisdiction given them by motion, to stay proceedings on the judgment or action; and to order the deed, bond, instrument, or other assurance, to be cancelled, and the judgment, if any has been entered, to be vacated. And in other cases, not specially provided for by the above clause, where a warrant of attorney has been given to confess a judgment, or judgment has been entered up in this court, for securing the payment of an annuity, the court in virtue of their *general* jurisdiction, will enter into the validity of the warrant of attorney or judgment, upon motion; and if the provisions of the act have not been complied with, will vacate the warrant of attorney, or set aside the judgment<sup>1</sup>. But where an action was brought by executors, on a bond given by the defendant to their testator, for securing an annuity, and upon a plea of

<sup>1</sup> 4 T. R. 694. 1 H. Blac. 2 Ven. jun. 138. S. C. 6 T. 639. 4 Bro. Ch. Cal. 310. R. 737.

*non est factum*, they obtained a verdict and judgment, and levied execution thereon, the court held this not a case where they could give relief, upon a summary application under the annuity act, for a defect in the memorial<sup>a</sup>; for the act only meant to refer to such judgments on warrants of attorney, as were intended to be a part of the security for the annuity, and not to extend to cases, where a judgment is obtained in the ordinary course of law, on any instrument given for securing the same<sup>b</sup>.

Upon the fourth section of the act, the application to the court should be made by the person by whom the annuity is payable; but the court in one instance set aside a judgment entered on the annuity bond, and execution sued out thereon, for a defect in the memorial, upon the application of a judgment-creditor of the grantor, with a view of letting in a subsequent judgment of his own<sup>c</sup>. In a subsequent case however, where the grantor of an annuity had assigned a lease for securing the payment of it, and afterwards sold his interest in the lease to a fair purchaser, it was holden, that the latter was not entitled under the annuity act, to apply to

<sup>a</sup> 7 T. R. 495. <sup>b</sup> *Per Lord Kenyon, id.* 496. <sup>c</sup> 5 T. R. 9.  
the

the court to have the security delivered up to be cancelled, because the memorial required by the act was not duly registered<sup>c</sup>.

The courts are expressly authorised by the fourth section of the act, to order the *deed*, &c. to be cancelled, as well as to set aside the judgment, or stay the proceedings. But where the application is made to the general jurisdiction of the court, it seems that they will only vacate the warrant of attorney, or set aside the judgment or execution; and not make any order respecting the deeds, &c. which are declared by the act to be null and void to all intents and purposes<sup>d</sup>. And it is doubtful, whether all the deeds, &c. can be set aside, when one only is objectionable<sup>e</sup>.

The laches of the party applying does not of itself furnish an answer to the application<sup>f</sup>; but where it appeared that he had acquiesced in the payment of the annuity, and had lain by till the persons acquainted with the original transaction were dead, the court refused to interfere,

<sup>c</sup> 6 T. R. 403.

Ch. Caf. 310. 2 Vez. *jun.*

<sup>d</sup> 2 Vez. *jun.* 138. 6 T. 154. S. C. *contra*. And see R. 404, 739. 7 T. R. 253. 6 T. R. 471.

But see Pul. & Bos. 66.

<sup>e</sup> *Grant v. Foley*, T. 23 G.

<sup>f</sup> 4 T. R. 694. 4 Bro. III.

and

and relieve him in a summary way<sup>a</sup>. And where an ejectment was brought to recover possession of lands extended under an *elegit*, upon a judgment confessed, which had been entered up on a warrant of attorney given for securing an annuity, it was holden to be too late for the grantor to object to the consideration of such annuity, upon a summary application for staying the proceedings after verdict in such ejectment, because he had an opportunity of making his defence to the action<sup>b</sup>. If a question respecting the validity of an annuity has been decided, by a court of competent jurisdiction, the court of king's bench will not suffer it to be agitated again, if the point has been directly determined; but that is not the case, where the question has only incidentally occurred, and has not been positively decided<sup>c</sup>. In a late case however, where, upon a previous application to set aside an annuity, for non-compliance with the requisites of the act, the rule was discharged upon discussion of the merits, the court would not entertain a similar application between the same parties, on the same state of facts, though ground-

<sup>a</sup> 5 T. R. 139.<sup>b</sup> 7 T. R. 540.<sup>c</sup> 4 T. R. 471.

ed upon a new objection to the annuity, which was not before urged or considered <sup>k</sup>.

A motion is sometimes preceded by a *notice* <sup>l</sup>, and in general accompanied with an *affidavit*. The notice of motion, though seldom necessary <sup>m</sup>, is frequently given, in order to save time and expence, by affording the adverse party an opportunity of shewing cause in the first instance, or by inducing the court to disallow the costs of proceedings, had after the notice and before the motion. The *affidavit* should be made before the rule is moved for, and produced in court at the time of making the motion <sup>n</sup>; and it should be properly entitled <sup>o</sup>, and contain a full statement of all the circumstances necessary to support the application; and the rather, as it is a rule not to receive supplementary affidavits, on shewing cause, without leave of the court: but there is a diversity between affidavits which contain new matter, and where they tend only to confirm what was alledged and sworn, when the

<sup>k</sup> 7 T. R. 455.

<sup>l</sup> Append. Chap. XIX.

<sup>m</sup> The statute 14 Geo. II. c. 17. requires notice of motion, for judgment as in case of a nonsuit; but in this

court, the rule to shew cause is deemed a sufficient notice.

Lofft, 65. *Aliter in C. B.*  
1 H. Blac. 527.

<sup>n</sup> R. H. 36 G. III.

<sup>o</sup> 2 Salk. 461. 2 T. R. 644.



rule was made; in the latter case, it seems they may be read, not in the former <sup>a</sup>.

Motions and affidavits for attachments, in civil suits, are proceedings on the civil side of the court, until the attachments are granted, and are to be *entitled* with the names of the parties<sup>o</sup>: but as soon as the attachments are granted, the proceedings are on the crown side, and from that time the king is to be named as the prosecutor<sup>p</sup>. The affidavits on a motion for leave to file a criminal information, ought not to be entitled; and if they are, cannot be read: the affidavits produced on shewing cause may<sup>q</sup>, or may not<sup>r</sup> be entitled; but all affidavits made after the rule is absolute, must be entitled<sup>s</sup>. So where a submission to an award is made a rule of court, under the statute, there being no action, the affidavits on which to apply for an attachment, for disobeying the award, need not be entitled in any cause; but the affidavits in answer must<sup>t</sup>; and the christian names as well as surnames of the parties must be inserted in the title of an affidavit, produced

<sup>a</sup> 2 Salk. 461.

<sup>o</sup> 3 T. R. 253. 7 T. R. 439, 528.

<sup>p</sup> *Id.* 3 T. R. 133.

<sup>q</sup> 1 Str. 704. Andr. 313.

<sup>r</sup> 6 T. R. 60.

<sup>s</sup> *Id.* 642.

<sup>t</sup> 3 T. R. 60r.

to shew cause against any rule<sup>a</sup>. An affidavit sworn before the attorney in the cause cannot be read<sup>v</sup>, except for the purpose of holding the defendant to special bail<sup>w</sup>: And where an affidavit is made before a commissioner, by a person who from his signature appears to be illiterate, the commissioner taking the affidavit shall certify, or state in the *jurat*, that it was read in his presence, to the party making the same, who seemed perfectly to understand it, and wrote his signature in the presence of the commissioner<sup>x</sup>. It is also a rule, that upon every affidavit sworn in this court, or before any judge or commissioner thereof, and made by two or more deponents, the names of the several persons making such affidavit shall be written in the *jurat*; and that no affidavit be read or made use of, in any matter depending in this court, in the *jurat* of which there shall be any interlineation or erasure<sup>y</sup>.

An attachment for non-payment of costs, and against the sheriff for not returning the writ, may be moved for the *last* day of term<sup>z</sup>.

<sup>a</sup> 7 T. R. 661.

R. 284.

<sup>v</sup> 3 T. R. 403.

<sup>w</sup> R. M. 37 G. III. 7 T.

<sup>x</sup> *Ante*, 70.

R. 82.

<sup>z</sup> R. E. 31 G. III. 4 T.

<sup>y</sup> 1 Bur. 651. 5 Bur. 2686.

But the master's report upon interrogatories of contempt cannot be moved for on that day, without previous leave of the court, except in extraordinary cases, and upon personal service of the notice<sup>a</sup>: And a motion to answer the matters of an affidavit cannot be made on the last day of term<sup>b</sup>, or any motion which would operate as a stay of proceedings, unless it appear to the court that, under the circumstances, it could not have been made earlier<sup>c</sup>. So the court will not, on the last day of term, hear a motion for a rule *nisi* to set aside an award<sup>d</sup>; nor can counsel be heard on that day, to shew cause against such a rule, but the same must be enlarged, and made a peremptory for the next ensuing term<sup>e</sup>. A rule *nisi* for a criminal information may be granted at the end of a term, against a magistrate, for malpractices during the term; but not for any misconduct before the term<sup>f</sup>. The last day of term is not a day for side-bar rules; but if the party was entitled to such a rule before, he may take it out on the last day of term, dated as of the preceding day: And Mr. Justice Twissden

<sup>a</sup> 1 Blac. Rep. 311.

<sup>b</sup> 4 Bur. 2502.

<sup>c</sup> *Leader v. Harris*, M.  
37 G. III.

<sup>d</sup> *Nettleton v. Croft*, H.

38 G. III.

<sup>e</sup> R. M. 36 G. III.

<sup>f</sup> 7 T. R. 80.

used to cite the book of Ed. IV. and say, they were to hear no law the last day of term<sup>2</sup>.

The rule to shew cause is drawn up for a particular day in term, appointed by the clerk of the rules, according to the *place* where the transaction appears to have happened, upon the face of the affidavits, on which the rule was obtained, and so as to allow the party called upon sufficient time to answer the application: If in town, the rule is usually drawn up for the *fourth* day, exclusive of the day of obtaining it; if in the country, for the *sixth* day in near, or for the *tenth* day in distant counties, unless it be otherwise ordered by the court. And previous to the day of shewing cause, the rule should be duly served. To bring a party into contempt, a copy of the rule must be *personally* served, and the original at the same time shewn to him<sup>3</sup>: In other cases, the same degree of strictness is not required in the service of the rule, but it is sufficient, without shewing the original, to leave a copy of it with any person representing the party, at his dwelling-house or place of abode. And when a rule is obtained, to set aside proceedings for irregularity, and to stay proceedings in the mean time, the proceed-

<sup>2</sup> 2 Salk. 624.

<sup>3</sup> 3 T. R. 351.

ings are suspended for all purposes, till the rule is discharged<sup>1</sup>: therefore where the plaintiff took an assignment of the bail-bond, pending a rule to shew cause, why it should not be given up to be cancelled, on the defendant's filing common bail, the court set aside the assignment, as having been made too soon.

On the day appointed for that purpose, the counsel for the party called upon by the rule, may shew cause against it, either upon or without an affidavit, made and filed by the party shewing cause, as circumstances require. But an office-copy must be first taken of the rule, and of the affidavit upon which it was granted<sup>2</sup>, or otherwise counsel cannot be heard: And in all cases, where a special time is limited in any rule, before which any affidavit is required to be filed, no affidavit filed after that time can be made use of in court, or before the master, unless it appear to the satisfaction of the court, that the filing of such affidavit within the time limited, was prevented by inevitable accident<sup>1</sup>. Previous to shewing cause, it is usual to deliver over the affidavit to the counsel for the rule, who has a right to make any objection arising on the face of it; and if a

<sup>1</sup> 4 T. R. 176.

<sup>2</sup> R. M. 9 G. II.

<sup>1</sup> R. M. 36 G. III.



doubt arise, upon the statement of the facts contained in the affidavit, it is inspected by the judges, or read by the officer of the court. When an affidavit has been made use of, but not before, it should be filed with the clerk of the rules, in order that it may be used as evidence, if necessary, on an indictment for perjury<sup>m</sup>.

If cause be not shewn on the day appointed, the counsel for the party obtaining the rule may move, the next day, to make it absolute; which is done as a matter of course, if no cause be shewn, on an affidavit of service. But it frequently stands over, by consent of parties, or for the accommodation of counsel, till a subsequent day, when the counsel on either side may bring it on, by moving to make the rule absolute, or discharge it; though if not brought on, or enlarged, during the same term, it is of no effect, unless revived, as it may be, in any future term, upon being served anew, and motion made to revive it: This is sometimes done, to save the expence of new affidavits, and obviate the objection of its being a second attempt, after the first was abandoned.

When the counsel for the party obtaining the rule is not ready to support it, he may move to

<sup>m</sup> 7 T. R. 315.

*enlarge* the rule till a future day, in the same or the next term; which is pretty much of course, when it is in his own delay, but otherwise the court will not enlarge the rule without consent, or some evident necessity; and they will never enlarge the plaintiff's rule, when it would have the effect of continuing the defendant in custody. In like manner, when the counsel for the party called upon by the rule is not prepared to shew cause against it, he may apply to enlarge the rule, till a future day; which is a matter of right, if the rule was not served in time, so as to give the party an opportunity of answering it; but otherwise the court may impose upon him what terms they think proper, and they commonly require him to file his affidavits, so as to give the adverse party an opportunity of inspecting them, previous to the day appointed for shewing cause. In cases of urgency, the court, towards the end of the term, will sometimes enlarge the rule till a day in vacation, when it is to be brought on before a judge at chambers.

On shewing cause against the rule, the court either make it absolute, or discharge it; and that, either with or without the costs of the application, or such costs are directed to abide the event of the suit. When the proceedings

ings are regular, and the application is made to the favor and indulgence of the court, the rule to shew cause is commonly made absolute, on payment of costs by the party applying; but when the proceedings are irregular, the rule to shew cause, why they should not be set aside, is commonly drawn up with costs, to be paid by the opposite party: And if the rule be made absolute generally, the party obtaining it is entitled, by the terms of the rule, to the payment of costs, which the master will tax, and if they are not paid on demand, the court on motion will grant an attachment. But if a rule *nisi* be granted for setting aside proceedings for irregularity, without saying with costs, and this rule be afterwards made absolute, no cause being shewn, it must be made absolute in the terms in which it was moved, without adding costs<sup>a</sup>. And though the rule be drawn up with costs, yet the court in some instances will make it absolute without costs, in which case each party pays his own; or they will direct the costs to abide the event of the suit, in which case the party ultimately succeeding is entitled to them: And whenever a rule is drawn up with costs, and the court do

<sup>a</sup> *Per Cur.* H. 37 G. III.

not mean the party should have them, they will mention it.

If, upon shewing cause, it appear that there was no ground or foundation for the rule, the court will discharge it, with costs to be paid by the party applying; and in all cases, where a rule is obtained to shew cause why proceedings should not be set aside for irregularity with costs, and such rule is afterwards discharged generally, without any special direction upon the matter of costs, it is understood to be discharged with costs, and the latter rule must be drawn up accordingly<sup>a</sup>. But if there was any ground for the rule, and it is not drawn up with costs, the court will, in general, discharge it without costs, or they will sometimes order the costs to abide the event of the suit. And where nothing is said about costs in the rule, or by the court on making it absolute, or discharging it, they are considered as costs in the cause, and must be paid to the party ultimately succeeding, if the rule be made before judgment; but if it be not made till afterwards, they depend entirely on the rule, and if nothing be said therein concerning them, each party will have to pay his own costs.

<sup>a</sup> R. M. 37 G. III. 7 T. R. 82.

If a party obtain a rule to shew cause, requiring two things with costs, although he be clearly entitled to one, yet if he fail as to the other, he shall not have costs; for the adverse party was under the necessity of coming into court to resist the latter.

Particular days are appointed for certain business, as *Tuesday* and *Friday*, which are called *paper-days*, for going through the paper of causes, wherein *conciliums* have been moved for, on the civil side; and *Wednesday* and *Saturday*, for transacting business on the crown side. But no cause can be set down for argument on the first paper-day, or on the four last days of business in term: Yet, upon the day which would otherwise be the last paper-day, common things may be set down, unless it be the last day of term. All motions or rules in matters of length or consequence, are appointed for particular days, and called on first°. Special causes are to be entered with the clerk of the papers, at least *four* days exclusive of the day of argument; of which notice should be forthwith given to the attorney or agent on the other side: and all such causes must be argued in the order they are entered,

° Pref. to Bur. V.



and not adjourned to any future day, by consent or otherwise; unless the court shall for reasonable cause, verified by affidavit, upon application made by either of the parties, their attorney or agent, at least *two* days before the day of argument, otherwise order<sup>p</sup>. Special cases from the assizes should regularly be set down for argument, within the four first days of the following term, and can never be set down for argument on any of the four last days of the term<sup>q</sup>. All rules enlarged till the next term are fixed for certain *peremptory* days<sup>r</sup>; and must be heard upon the respective days for which they are made peremptory, unless special ground by affidavit or otherwise, be shewn to the court, for postponing such rules<sup>s</sup>. If a rule be drawn up wrong by mistake, the court will order it to be made right; or if made absolute, or discharged by surprise, they will open it.

<sup>p</sup> R.M. 30 G. II. 1 Bur. 52.

<sup>q</sup> *Per Lord Kenyon*, in the case of *Cutter, v. Powell*, H. 35 G. III. *Lord Mansfield* wished to relax this, which is the old rule; but on consideration, the court in the above case, thought it right to adhere to it: And in M.

38 G. III. this rule not having been observed, the court directed it to be peremptory in future.

<sup>r</sup> R. M. 30 G. II. H. 6 G. III. H. 15 G. III. M. 17 G. III. Pref. to Bur. V. 1 Bur. 9. 3 Bur. 1842.

<sup>s</sup> R. H. 36 G. III.

In hearing motions, the course formerly was, to begin every day with the *senior* counsel within the bar, and then to call to the next *senior* in order, and so on, as long as it was convenient to the court to sit; and to proceed again in the same manner, upon the next and every subsequent day, although the bar had not been half, or perhaps a quarter gone through, upon any one of the former days; so that the *juniors* were very often obliged to attend in vain, without being able to bring on their motions, for many successive days<sup>†</sup>. This practice bearing hard upon *junior* counsel, Lord *Mansfield* introduced a different rule, which has ever since been adhered to, of going quite through the bar, even to the youngest counsel, before he would begin again with the *seniors*; even though it should happen to take up two or more days, before all the motions, which were ready at the bar upon the first day, could be heard<sup>‡</sup>.

Where a matter comes before the court on a rule to shew cause, as on a motion for a new-trial, in arrest of judgment, or to quash an order of sessions, &c. all the counsel are heard on each side; the counsel who shew cause first, and then the coun-

<sup>†</sup> 1 Bur. 57.

<sup>‡</sup> *Id.* 58.

fel on the other side: If there are several counsel, the *senior* begins. Where a matter comes before the court on a rule for a *concilium*, as on a special verdict or special case, demurrer, writ of error, or motion to quash a conviction, &c. one counsel only (commonly the *junior*) is heard on each side; on a special verdict or special case, the counsel for the plaintiff begins first, or on a demurrer, writ of error, or motion to quash a conviction, the counsel for the party objecting; the counsel for the other party is then heard in answer, and the counsel who began first replies. After a special argument on a *concilium*, it is usual for the court to call upon each of the counsel concerned, to make a motion, which is called moving for their argument; but it seems that in this court, it is not the practice to call upon the counsel to move for their argument, for a matter of course, though it is said to be otherwise in the common pleas. On motions for judgment without argument, on paper-days, one shilling is paid for each motion, by the counsel making it, to the box; which is called *box-money*, or *bigb-bar money*, and paid by the secondary on the plea-side, into the hands of the clerk of the *junior* judge, in order to be by him paid over to the

judges of the court, in equal shares, to be disposed of by them for such charitable purposes, as they in their discretion shall think proper<sup>v</sup>. On the last day of term, two shillings are paid for the first motion, and one shilling for every motion afterwards.

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Analogous to these proceedings in court, is the practice by *summons* and *order*, at a judge's chambers, of which something has been already said, in the preceding chapter. This practice seems to have arisen, partly from the overflowing of the business of the court in term-time, and partly from the necessity of certain proceedings being had in vacation, when the court is not sitting: And although extremely burthensome to the judges, yet if kept within due bounds, it manifestly tends to the advantage of the suitor, the ease of the practitioner, and the general advancement of justice, by preventing the expence, trouble, and delay, which would ensue, if an application to the court were in all cases necessary. The order obtained upon a summons is however subject to an appeal, and the validity of it may be impeached two ways; either

<sup>v</sup> R. T. 32, 33 G. II. 2 Bur. 867.

by

by moving the court to set it aside, or, if made in vacation, by applying, in the next term, to set aside the proceedings that have been had under it<sup>x</sup>. But if the order be acquiesced under, it is as valid as any act of the court: and a judge's order for a prisoner's discharge under the Lords'-act, made out of term, has been held to be final<sup>y</sup>. Indeed, if it become necessary to enforce a judge's order by attachment, or other act of the court, there must be a previous motion to make it a rule of court<sup>z</sup>.

<sup>x</sup> 4 Bur. 2569.

<sup>y</sup> Doug. 68.

<sup>z</sup> 4 Bur. 2569. *Per Lord*

*Kenyon, in Curtis v. Taylor,*  
E. 35 G. III.



## CHAP. XX.

*Of* SETTING ASIDE, *and* STAYING  
PROCEEDINGS.

**I**N the defence of an action, one of the first things to be attended to, on the part of the defendant, is the *regularity* of the proceedings; for if they are irregular, the court on motion will set them aside.

An irregularity may be defined to be, the want of adherence to some prescribed rule or mode of proceeding; and it consists, either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time, or improper manner. Thus, the want of notice is an irregularity, whether it be to process, upon a declaration, or of trial or inquiry; so, if the notice be not given in due time, or a proper manner. An interlocutory judgment, for want of a plea, is irregular, when it is signed either before the time for pleading is expired, or after a plea has been properly pleaded. And in general,  
it

it may be remarked, that whenever the proceedings are irregular, the court on motion will set them aside, provided the application for that purpose be made in the first instance; for in all cases of irregularity, the party should apply to the court as early as possible, and if he either proceed himself, after discovering the irregularity, or lie by and suffer the other party to proceed, the court will not assist him<sup>a</sup>.

Though the proceedings are regular, yet it sometimes happens that the cause of action is frivolous, or the action brought or conducted, upon bad or defective grounds, contrary to good faith, or without proper authority: And in such cases, the court on motion will order the proceedings to be stayed, with or without costs, according to circumstances.

When the debt sued for appears, on the face of the declaration<sup>b</sup>, or is admitted by the plaintiff or his attorney<sup>c</sup>, or proved by the affidavit of the defendant<sup>d</sup>, to be under *forty* shillings, and

<sup>a</sup> 3 T. R. 7, 10. 5 T. R. 111. Formerly, when the plaintiff demanded more, the court would not permit an affidavit to be read, that the defendant owed him less.

<sup>b</sup> 3 Bur. 1592.

<sup>c</sup> 2 Blac. Rep. 754.

<sup>d</sup> 4 T. R. 495. 5 T. R. 64. *White v. Griffiths*, T. 35 G. Say. Rep. 219, 240. 3 Bur. 1592.

and the plaintiff may recover it in an inferior jurisdiction, the court on motion will stay the proceedings; it being below their dignity, to proceed in such action. But an action cannot be brought in the county-court, unless the cause of action arise, and the defendant reside within the county\*: therefore, though the demand be for less than forty shillings, if the cause of action arise in one county, and the defendant reside in another, the action may be brought in a superior court\*. And where a defendant, living within the jurisdiction of the court of requests for *Westminster*, was sued in this court for a debt under 40s. and neglected to take advantage of the statute 23 Geo. II. c. 27. by pleading it in bar, the court would not, after verdict for the plaintiff, either suffer a suggestion to be entered on the record, that the defendant lived within the jurisdiction, or stay the proceedings†. So where a cause has been removed from an inferior court, this court will grant a *procedendo*, if the debt or damages appear to be under forty shillings‡: But the court refused

1592. but the practice has been since altered as above, agreeably to the usage of the Court of Exchequer.

29. Pol. & Bos. 75.

† 3 T. R. 452.

‡ Brownl. *Brev. Jud.* 140.

2 Brownl. 82. Moyle, 69.

\* 6 T. R. 175. 2 H. Blac.

Clift, 374.

to quash a *certiorari* upon this ground, in an action for an assault brought against excise officers, who could not have an impartial trial in the inferior court<sup>n</sup>.

In a *penal* action, on the 25 Ed. III. ft. 4. c. 3. where the application was made in an early stage of the cause, the proceedings were stayed on motion; because no affidavit had been filed, that the offence was committed within the county where the action was brought, or within a year before the bringing of it, according to the 21 Jac. I. c. 4.<sup>1</sup> But in a subsequent case, where the application was not made till after verdict, the court would not stay the proceedings, on a similar ground, in a penal action on the 21 Hen. VIII. c. 13. § 26. for non-residence<sup>k</sup>: And, in the latter case, it was holden, that the stat. 21 Jac. I. c. 4. does not control any of those statutes, on which penal actions are to be brought in the superior courts; but only applies to those, on which proceedings may, and ought to be had before justices of assize, justices of the peace, &c.

In an action for bribery, on the 2 Geo. II. c. 24. the court will stay the proceedings, even

<sup>n</sup> 4 T. R. 499.

<sup>i</sup> 2 T. R. 274.

<sup>k</sup> 3 T. R. 362. and see

2 Str. 1081. 1 H. Blac. 546.

after

after verdict, upon the clause of discovery<sup>1</sup>, or if the action be not prosecuted without wilful delay<sup>2</sup>. And the proceedings have been stayed in an action on the 18 Geo. II. c. 34.

§ 1. for keeping a gaming-house; because, by a previous statute<sup>3</sup>, the penalty is payable on conviction, before a justice of the peace. Also, by the 26 Geo. III. c. 77. § 13. "If any action be commenced or prosecuted, for the recovery of any penalty or forfeiture, by virtue of any act, relating to the *customs or excise*, unless the same be commenced and prosecuted in the name of the attorney-general, or some officer of the said revenues, the same, and all proceedings therein, are declared to be null and void; and the court shall not permit or suffer any proceedings to be had thereupon." And by the 36 Geo. III. c. 104. § 38. "It shall not be lawful for any person or persons to commence or enter, or cause or procure to be commenced or entered, or filed or prosecuted, any action, suit, bill, plaint, or information, for the recovery of any penalty or penalties, inflicted by any of the laws touching or concerning *lotteries*, or

<sup>1</sup> 4 Bur. 2287.

<sup>2</sup> 3 T. R. 5.

<sup>3</sup> 12 Geo. II. c. 28. § 1.



“ by that act, unless the same be commenced,  
 “ entered, filed, and prosecuted in the name of  
 “ his majesty’s attorney-general, in the court of  
 “ *Exchequer* at Westminster, if the offence shall  
 “ be committed in *England*; or in the name of  
 “ his majesty’s advocate-general in the court  
 “ of *exchequer* in *Scotland*, if the offence shall  
 “ be there committed. And if any action, &c.  
 “ shall be commenced or entered, in any other  
 “ person’s name or names, the same and all pro-  
 “ ceedings thereupon had, are declared to be  
 “ null and void, and the court where such pro-  
 “ ceedings shall be so commenced, shall cause  
 “ the same to be stayed.”

But in a *qui tam* action for insuring lottery tickets, contrary to the 16 Geo. III. c. 34. the court would not stay the proceedings, upon an affidavit of the defendant, that a former action had been brought against him, in the common pleas, for the same offence, in which he had leave to compound; but said, he must plead such matter specially°. And the court would not stay the proceedings, in an action against a sheriff’s officer, on the 32 Geo. II. c. 28. § 12. though a similar action had been commenced

against the sheriff, for the same offence<sup>p</sup>: though where actions had been brought against both, and a verdict obtained in each, the court stayed the proceedings, on payment of one penalty, and the costs in both actions<sup>q</sup>.

When an action is brought pending a reference, or otherwise contrary to good faith, the court will not suffer the plaintiff to proceed in it: and they will stay the proceedings, when the action is brought by an attorney, without proper authority; for otherwise the defendant might be twice charged<sup>r</sup>. So where an action was brought against an agent for prize-money, the court set aside the proceedings, with costs to be paid by the attorney; because the letter of attorney from the plaintiff, to receive the prize-money, was not duly attested, pursuant to the 20 Geo. II. c. 24. § 6.<sup>s</sup>

There are some distinctions, deserving notice, between a mere irregularity, and a complete defect in the proceedings; the former may be waived by the adverse party, but not the latter<sup>t</sup>: For a mere irregularity, the court will only set aside the proceedings that are irregular, leaving

<sup>p</sup> 2 T. R. 512.

<sup>q</sup> *Id.* 712.

<sup>r</sup> 1 T. R. 62.

<sup>s</sup> *O'Hara v. Innes*, M. 27

G. III. K. B.

<sup>t</sup> 5 T. R. 254.

the plaintiff at liberty to continue his suit from the last regular proceeding; but for a complete defect, the proceedings are stayed *in toto*: On setting aside proceedings for irregularity, the party complained of is in general liable to the payment of costs<sup>u</sup>; but on staying them as defective, the costs are in the discretion of the court.

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There are other grounds of staying the proceedings; not absolutely, but for a time, or until something be done for the benefit of the defendant: These are, pending a writ of error; until security be given for the payment of costs; or until the costs are paid, of a former action for the same cause.

A writ of error regularly sued out, is a *superseas* of execution, from the time of its allowance<sup>v</sup>; provided bail, when requisite, be put in thereon in due time<sup>w</sup>: But this does not prevent the plaintiff from proceeding by action of debt, or *scire facias* on the judgment, against the principal; or by *scire facias*, or action of debt on the recognizance, against the bail. In such cases

<sup>u</sup> Cal. temp. Hardw. 314.

<sup>w</sup> 2 Str. 781. 1 T. R. 279.

<sup>v</sup> 1 Salk. 321. 1 Bur. 340.

however,

however, if the writ of error be not evidently brought for the mere purpose of delay, the court will stay the proceedings upon terms, pending the writ of error<sup>2</sup>. But this is not a matter of course<sup>7</sup>; and if it be apparent to the court, that the writ of error is brought merely for delay, they will not stay the proceedings<sup>2</sup>. How that is to be made out, depends upon the circumstances of each particular case: In general, the proceedings may be stayed, where the defendant or his attorney has declared, that the writ of error was brought only for delay, or used expressions tantamount to such a declaration<sup>3</sup>; but the *belief* of the other party, that it is brought for delay, is not sufficient<sup>4</sup>.

Where a writ of error was brought on a judgment of *non suit*, the court in one case refused to set aside an execution, sued out after notice of its allowance; because the writ of error in such case, must evidently have been brought for the purpose of delay<sup>5</sup>. But in a subsequent case<sup>6</sup>,

<sup>2</sup> 1 Str. 419. 1 Willf. 120.      <sup>3</sup> 3 T. R. 79. 5 T. R.  
<sup>3</sup> Bur. 1389. Cowp. 72. 3 T. 714.  
 R. 78.      <sup>4</sup> 3 T. R. 78.  
<sup>7</sup> 2 T. R. 78.      <sup>5</sup> 4 T. R. 436. 1 H. Blac.  
<sup>2</sup> *Per Buller*, Just. 4 T. 432.  
 R. 437. Cowp. 72. *semb.*      <sup>6</sup> 5 T. R. 669.  
*contra.*

the court stayed the proceedings pending a writ of error, on a similar judgment; saying, that the practice not to stay proceedings, pending a writ of error, must be confined to those cases, where the party himself, his attorney, or bail, declare that the writ of error is brought for delay.

On a judgment recovered in the common pleas, the defendants first brought a writ of error in this court, and then brought another, returnable in parliament, after which they *nonpros'd* the first writ of error, and then obtained a rule to shew cause, why the proceedings in an action upon the judgment, brought in this court, should not be stayed, pending the second writ of error; the court discharged the rule with costs; as it plainly appeared, from the defendant's own conduct, that there was no foundation for a writ of error, and that it could only be brought for vexatious purposes\*. But the court will not permit execution to be taken out, pending a writ of error in parliament, on the ground that the writ of error is brought for delay, merely because the defendant suffered judgment to be affirmed in the exchequer-chamber, without any objection†. In *eject-*

\* 2 T. R. 78

6 T. R. 400.

*ment,*



*ment*, if there be judgment for the plaintiff, and the defendant bring a writ of error, the court will not suffer the latter to proceed in a new ejectment, on the same title, till he has quitted the possession, or the tenants have attorned to the lessor of the plaintiff<sup>s</sup>: And where a defendant in ejectment brought a writ of error in parliament, the court obliged him to enter into a rule, "not to commit waste, during the pendency of the writ of error<sup>a</sup>."

In order to stay the proceedings in an action of debt, or *scire facias*, on a judgment, pending a writ of error, it is necessary, if the action be bailable, that the defendant should be first in court, by putting in and perfecting bail<sup>1</sup>. And where an action is brought upon a judgment of the court of common pleas, this court will not stay proceedings, pending a writ of error, without the defendant's giving judgment in the second action<sup>2</sup>, and undertaking not to bring a writ of error upon that judgment<sup>1</sup>. But if the action be brought upon a judgment of this

<sup>a</sup> 2 Salk. 258, 9.

R. 638.

<sup>1</sup> 3 Bur. 1823.

<sup>1</sup> Cowp. 72. *Swann v.*

<sup>1</sup> 5 T. R. 9. 6 T. R. 455.

*Boulton*, H. 35 G. III.

<sup>2</sup> *Per Buller*, Just. 1 T.

court,

court, these terms make no part of the rule; because, in general, actions on judgments are vexatious, and the plaintiff might have his execution on the first judgment<sup>1</sup>. And where the proceedings were stayed, without imposing these terms, and the plaintiff died before judgment affirmed, the court would not afterwards permit judgment to be entered *nunc pro tunc*<sup>m</sup>.

If the defendant bring a writ of error, and the plaintiff bring an action on the judgment, and recover, he cannot sue out execution on the second judgment, till the writ of error be determined<sup>n</sup>. According to this decision, the plaintiff cannot be benefited by bringing an action on the judgment, pending a writ of error, except in cases where he may hold the defendant to special bail; and it is but of little service for the defendant to move the court to stay the proceedings in such an action, for if he let judgment go by default, the plaintiff cannot sue out execution.

On a *scire facias*, or action of debt on recognizance, against bail, when a writ of error

<sup>1</sup>Per Buller, Just. 1 T. R. 2454. S. P. but see 1 Str. 638.

<sup>m</sup> 1 T. R. 637.

<sup>n</sup> 3 T. R. 643. 4 Bar.

526. Barnes, 202. *semb. contra*.

is allowed, on the judgment in the original action, and the bail apply within their time for surrendering the principal<sup>o</sup>, the court will stay the proceedings, until the writ of error is determined<sup>p</sup>; the bail undertaking to pay the condemnation-money, or surrender the defendant into the custody of the marshal, within *four* days next after the determination of the writ of error, in case the same shall be determined in favour of the defendant in error<sup>q</sup>. And in one case<sup>r</sup>, where the writ of error was allowed before the time was expired for surrendering the principal, though notice of such allowance was not given to the plaintiff's attorney, nor the application consequently made till after the expiration of that time, the court gave the bail the same terms, as are usual when they apply within the time granted, by the course of the court, for surrendering the principal. But bail must be put in upon the writ of error, when necessary, before the application is made<sup>s</sup>. And in general, when the bail do not apply to stay the proceedings, pending error, till their time to surrender is out, the court will not give them

<sup>o</sup> *Ante*, 145. 6, 7.

<sup>p</sup> 1 Str. 419.

<sup>q</sup> 1 Bur. 340.

<sup>r</sup> 1 Bur. 340.

<sup>s</sup> 2 Str. 781.

any

any time for that purpose, but only four days to pay the money in, after the judgment is affirmed<sup>1</sup>.

Where error was not brought till it was too late for the bail to surrender, the court, in one case, would not stay the proceedings<sup>2</sup>. But, in a subsequent case<sup>3</sup>, proceedings were stayed; the bail undertaking to pay the condemnation-money, and the costs on the *scire facias*, in four days after affirmance; but in this case, there being no bail on the writ of error, the court made the bail also undertake to pay the costs on the writ of error, in case the judgment was affirmed; and said, it was a favour they were asking, and they would make them submit to equitable terms. By the affirmance of the judgment, in these cases, is meant the final affirmance of it; and therefore where the judgment, on a writ of error, was affirmed in the exchequer-chamber, and afterwards another writ of error was brought, returnable in parliament, the proceedings against the bail were further stayed, till the determination of the second writ of error<sup>4</sup>.

The plaintiff got judgment on the *scire facias* against bail, pending error by the prin-

<sup>1</sup> 2 Str. 872, 1270.

<sup>2</sup> 1 Str. 443.

<sup>3</sup> 2 Str. 877.

<sup>4</sup> 5 Bur. 2819.

cipal, and took them in execution; and on their moving to be discharged, the court said, though you might have applied, and had the proceedings stayed, yet we will not set them aside: If an action of debt had been brought upon the judgment, we should have granted an imparlance, if it had been asked; but we never set aside the judgment, when it is once signed, because we take it, you, by your not applying in time, have submitted to meet the plaintiff. *Quod fieri non debet, factum valet* <sup>2</sup>.

In *ejectment* <sup>1</sup>, where the lessor of the plaintiff, and in actions *qui tam* <sup>2</sup>, where the plaintiff is unknown to the defendant, the latter may call for an account of his residence, or place of abode, from the opposite attorney; and if he refuse to give it, or give in a fictitious account, of a person who cannot be found, the court will stay the proceedings, until security be given for the payment of costs. And in *ejectment*, where the lessor of the plaintiff is an infant <sup>3</sup>, resident

<sup>1</sup> 1 Str. 526. Barnes, 202. <sup>2</sup> 1 Str. 694. 2 Str. 932.  
*accord.* but see 4 Bur. 2454. 1206. 1 Wils. 130. Cowp.  
 3 T. R. 643. *semb. contra.* 24. Barnes, 183. Bul. N. P.  
<sup>1</sup> 1 Str. 681. 112. but see Cowp. 128.  
<sup>2</sup> *Id.* 697, 705. Barnes, 126.

abroad,



abroad<sup>b</sup>, or dead<sup>c</sup>, the court will stay proceedings, until a real and substantial plaintiff be named, or some responsible person undertake for the payment of costs. A similar undertaking is also required, in an action for the mesne-profits, brought in the name of the nominal plaintiff in ejectment<sup>d</sup>. And an uncertificated bankrupt, bringing an action of trover for goods, has been required to give security for costs, in case he should fail in his suit<sup>e</sup>.

But except in *ejectment*<sup>f</sup>, or actions *quædam*<sup>g</sup>, it was not formerly usual to require security for costs, where the plaintiff resided abroad<sup>h</sup>: For it was considered, that such a proceeding might affect trade, by excluding foreigners from our courts; and would be a means of clogging the course of justice. But now, although a plaintiff is not compellable to give security for costs, merely as a fo-

<sup>b</sup> 2 Bur. 1177. Say. Costs, stand over till the following term.  
153. S. C.

<sup>c</sup> Barnes, 147.

<sup>f</sup> 2 Bur. 1177. Say. Costs,

<sup>d</sup> Say. Rep. 78. Say. Costs, 153. S. C.

154. S. C.

<sup>g</sup> 1 Str. 697. 2 Str. 1206.

<sup>e</sup> 7 T. R. 296. *Sanders v.* 1 Willf. 266.

*Purfe*, H. 35 G. III. accord.

<sup>h</sup> 2 Str. 1206. 1 Willf. 266.

But in *Sutton v. Sutton*, T. Say. Costs, 155. 2 Bur. 1026. 38 G. III. the court doubted, 4 Bur. 2105. Cowp. 24, 158, and ordered the question to 322.

reigner, if he reside in this country<sup>1</sup>; yet whether he be a foreigner or native, if he reside abroad, out of the reach of the process of the court, the proceedings may be stayed, till his return, or security be given for the payment of costs<sup>k</sup>: Upon this ground proceedings have been stayed, where the plaintiff has been resident in Scotland<sup>1</sup>, or Ireland<sup>m</sup>. If a foreigner sue two defendants, and only one of them put in bail, that one may require the plaintiff to give security for the costs, without putting in bail for the other defendant<sup>n</sup>: And a rule calling on the plaintiff who had left the kingdom, to give security for the costs; may be made after issue joined, and notice of trial<sup>o</sup>. These are the only grounds upon which the proceedings can be stayed, for want of security for costs: It being holden, that they shall not be stayed, even in a *qui tam* action, merely on account of the plain-

<sup>1</sup> *Mingotti v. Drummond*, Say. Costs, 155. 6. 1 H. Blac. 106.

<sup>k</sup> 1 T. R. 267, 362, 491. 2 H. Blac. 118. 2 Anstr. 359. The defendant, in such case, must put in bail, previous to the application. 4 T. R. 697.

<sup>1</sup> *M'Lean v. Austin*, M. 36 G. III. *Sheriff v. Farquharson*, M. 37 G. III. S. P. but see 2 Bur. 1026.

<sup>m</sup> 1 T. R. 362. *Still v. M'Iver*, M. 36 G. III.

<sup>n</sup> 6 T. R. 496.

<sup>o</sup> *Id.* 597.

tiff's

tiff's poverty<sup>p</sup>; or in ejectment, where the lessor of the plaintiff is known, of full age, and resident in this country<sup>q</sup>.

In a second ejectment, the court will stay proceedings, until the costs are paid of a prior one, for the trial of the same title<sup>r</sup>. And it matters not, whether the second ejectment be brought by the lessor of the plaintiff, or by the *defendant*, in the former one<sup>s</sup>; or by or against all, or some of the parties<sup>t</sup>; or for the same or different premises, so as they be part of the same estate<sup>u</sup>; nor whether it be brought in the same or a different court: And the length of time which has elapsed, between the first and second ejectment, is not material<sup>v</sup>; for there may be many good reasons why the defendant did not call for the costs sooner, such as the poverty of the other party, or a view to quiet any further controversy<sup>w</sup>. But the vexation of the party is said to be the ground of these rules<sup>x</sup>: And

<sup>p</sup> Cowp. 24. Barnes, 126. S. C. 2 Blac. Rep. 1158,  
<sup>q</sup> 1 T. R. 491. 1180. C. B.

<sup>r</sup> 1 Salk. 255, 258, 9. 1 6 T. R. 223.  
Str. 548, 554. 8 Mod. 225. <sup>t</sup> *Id.* 740.  
S. C. 2 Str. 1152, 1206. <sup>u</sup> *Id. ibid.*  
1 T. R. 492. K. B. Pr. Reg. <sup>v</sup> 6 T. R. 223, 740.  
174. Barnes, 133. 2 Blac. <sup>w</sup> *Id.* 741.  
Rep. 904. Say. Costs, 239. <sup>x</sup> 4 Mod. 379. 2 Str. 1152:  
therefore

therefore, if there appear to be no vexation, the court will not make a rule for staying proceedings, until the costs are paid of a former ejectment<sup>7</sup>.

In other cases, it was not formerly usual to stay the proceedings, in a second action, until the costs were paid of a prior one, for the same cause<sup>8</sup>; and particularly, if the merits did not come in question, on the former trial<sup>9</sup>. But of late years, it has been done in several instances, on the ground of vexation<sup>10</sup>; and in one case<sup>11</sup>, where an action was brought by husband and wife, the court stayed the proceedings, until the payment of costs in a former action, at the suit of the husband only; it being for the same demand.

<sup>7</sup> 4 Mod. 379. 1 Str. 681. Rep. 809.

<sup>8</sup> 2 Str. 1099, 1121. Barnes. <sup>9</sup> 2 T. R. 511. K. B. Say. Costs, 245, 247. 2 Blac.

<sup>10</sup> 2 Str. 1206. Cowp. 322. Rep. 741. 3 Will. 149. S. C. Say. Costs, 252. S. C. 1 T. C. B. but see 1 H. Blac. 10.

<sup>11</sup> R. 491, 2. K. B. Barnes, 125. <sup>12</sup> Lampley & wife v. Sands, H. 25 Geo. III. K. B. C. B. but see 1 Vent. 100.

<sup>13</sup> 1 Ld. Raym. 697. 2 Blac.

## CHAP. XXI.

*Of COMPROMISING, and COMPOUNDING  
the ACTION.*

**W**HEN the proceedings are regular, and cannot be stayed, on any of the grounds stated in the preceding chapter, the defendant, in general, if he has no merits, either compromises the action, by paying or giving security for the debt and costs, compounds it, (if penal,) confesses it, or lets judgment go by default.

In actions for the recovery of a sum *certain*, where the parties are agreed as to the amount of the debt, it is of course to stay the proceedings, on payment of the same, together with the costs of the action: If the parties are not agreed, the defendant cannot move to stay the proceedings; but must either pay into court, on the common rule, what he conceives to be due, or let judgment go by default; and in actions for *general* damages, wherein the defendant cannot pay money into court, he has no  
option,



option, but must let judgment go by default, unless he can settle amicably with the plaintiff.

The practice of staying the proceedings, on payment of the debt and costs, though frequently confounded with, is in reality very different from that of bringing money into court, on the common rule; upon which the proceedings are not always stayed, but the plaintiff is at liberty to proceed, at his peril, for more than the sum brought in. And the practice we are now treating of, extends to every sort of action, brought for the recovery of a sum certain, as *assumpsit* or *covenant* to pay money, and *debt* for rent, &c.<sup>a</sup> If separate actions are brought against the acceptor, drawer, and indorsers of a bill of exchange, the court will stay proceedings against the drawer, or any of the indorsers, on payment of the bill, and costs of that action; but not against the acceptor, without payment of costs in all the actions<sup>b</sup>: And if the plaintiff proceed to judgment, the proceedings may still be stayed, on payment of the debt and costs<sup>c</sup>; but in that case, each defendant is only liable for his own costs, and the plaintiff cannot take out

<sup>a</sup> *Caf. temp. Hardw.* 173. <sup>b</sup> 4 T. R. 691. <sup>c</sup> 1 Str. 515.

execution against one defendant, for the costs of another.

In *debt* for the penalty of five pounds, for killing a hare, with no other count, the court let the defendant bring in the penalty and costs<sup>d</sup>. And in *debt* on bond, conditioned for the performance of covenants, or to account, indemnify, &c. the proceedings may be stayed, on payment of the whole penalty and costs<sup>e</sup>. We have already seen<sup>f</sup>, in what cases the court will stay the proceedings, in actions upon bail-bonds: It will be sufficient to add, in this place, that as the bail may render the principal, after an assignment of the bail-bond, and before they justify<sup>g</sup>, so, when they have rendered him, the proceedings on the bail-bond may be stayed, on payment of costs<sup>h</sup>, provided the plaintiff has not lost a trial. On staying proceedings, in an action of debt on recognizance, the bail above must pay the costs in that, as well as the debt and costs in the original action, though they apply within the time allowed them for surrendering the principal.

<sup>d</sup> 2 Str. 1217.

<sup>e</sup> 2 Blac. Rep. 1190. 6 T.

R. 303. but see 2 T. R. 388.

<sup>f</sup> 2 T. R. 446.

<sup>g</sup> Ante, 157, 8.

<sup>h</sup> 5 T. R. 401.

<sup>i</sup> Id. 534.

<sup>j</sup> Id. 363. *Bartram and others v. Howell*, T. 31 Geo. III. *contra*.

In debt on *bond*, conditioned for the payment of a less sum, it was usual for the court, even before the statute 4 Ann. c. 16. § 13. to relieve the defendant against the penalty of the bond, on payment of the principal, interest, and costs; but then the whole penalty must have been brought into court, and when the plaintiff was satisfied, the defendant might have taken what remained\*. By the above statute, it is enacted, that "if at any time, pending an action upon any such bond with a penalty, the defendant shall bring into court all the principal money and interest due on the bond, and also such costs as have been expended in any suit or suits in law or equity upon such bond, the said money, so brought in, shall be deemed and taken to be in full satisfaction and discharge of the said bond; and the court shall and may give judgment to discharge every such defendant of and from the same accordingly." Upon this statute it has been holden, that in an action upon a bond, conditioned for the payment of money generally, without naming any day of payment, the court will refer it to the master to compute *interest*, as

\* 2 Salk. 597. 6 Mod. 101. And see 3 Bur. 1370.

well as principal and costs; interest being due on such a bond, though not expressly reserved<sup>1</sup>. And the plaintiff is entitled to the costs of proceedings in equity, relating to the same matter<sup>2</sup>; but not to the costs of a former suit, wherein the judgment had been reversed on a writ of error<sup>3</sup>: for there is no reason, why the defendant should pay for the error or mistake of the plaintiff.

It was formerly holden, that this statute did not extend to an action of debt on bond, conditioned for the payment of an annuity, or of money by instalments<sup>4</sup>. But it is now settled, upon the equity of the statute, that in such an action, where the defendant is *solvent*, the court will stay the proceedings, on payment of the arrears and costs, and giving judgment as a security for future payments, with a stay of execution till they become due<sup>5</sup>. And where, in an action on an annuity-bond, it appeared that there were mutual accounts subsisting between the parties, the court made a rule for referring them to the master; and that upon payment of what, if any thing, should be found due to the plaintiff, all further proceedings

<sup>1</sup> 7 T. R. 124.

<sup>2</sup> Caf. temp. Hardw. 116.

<sup>3</sup> Str. 696. *contra*.

<sup>4</sup> 1 Str. 696.

<sup>5</sup> 1 Atk. 118. 1 Str. 515.

<sup>6</sup> 2 Str. 814, 957. 2 Blac.

Rep. 706. Barnes, 288.

should



should be stayed<sup>1</sup>. But the court will not stay the proceedings, where the defendant appears to be *insolvent*; or the bond is conditioned for the payment of a gross sum of money absolutely, at a day certain, and afterwards defeazanced, in consequence of a subsequent agreement, to pay the money by instalments<sup>2</sup>; or where, though the bond be conditioned for the payment of money by instalments, it is expressly agreed, that if default be made in any one payment, the bond is to stand in force, for the whole principal and interest then remaining due<sup>3</sup>. And if an instalment of an annuity secured by bond, be not paid on the day, the bond is forfeited, and the penalty is the debt in law: Therefore, where the defendant had been charged in execution for the penalty of 1000*l.* under such circumstances, previous to the insolvent act 34 Geo. III. c. 69., the court refused to order that sum to be reduced in the marshal's book, to the sum actually due for the arrears of the annuity, in order that he might take the benefit of that act<sup>4</sup>.

<sup>1</sup> *Wilkinson and Jordan, H.*

<sup>2</sup> 3 Geo. III.

<sup>3</sup> 3 Bur. 1370.

<sup>4</sup> 2 Blac. Rep. 958.

<sup>5</sup> 6 T. R. 399.



Before the statute 4 Geo. II. c. 28. it was usual for the court to stay the proceedings in *ejectment*, on a clause of re-entry for non-payment of rent, at any time before execution executed, on the tenant's bringing into court all the rent in arrear and costs<sup>u</sup>; And now, by that statute, "If the tenant or his assigns shall, at any time before the trial, pay or tender to the landlord, his executors, &c. or pay into court, all the rent and arrears, together with the costs, all further proceedings on the said *ejectment* shall cease and be discontinued." Since the making of which statute, it has been holden, as before, that after judgment against the casual ejector, and before any writ of possession executed, the court will stay the proceedings on payment of all the rent and costs<sup>v</sup>.

So in *ejectment* by a mortgagee, for the recovery of the possession of the mortgaged premises, or in debt on bond conditioned for the payment of the mortgage-money, or performance of covenants in the mortgage deed, where

<sup>u</sup> 2 Salk. 597. 10 Mod. 383. 8 Mod. 345.  
<sup>v</sup> See the stat. § 4. 10 Mod. 345. 2 Str. 900.

no suit in equity is depending for a foreclosure or redemption, it is enacted by the statute 7 Geo. II. c. 20. § 1. that "if the person having a right to redeem shall, at any time pending the action, pay to the mortgagee, or in case of his refusal, bring into court, all the principal monies and interest due on the mortgage, and also costs to be computed by the court, or proper officer appointed for that purpose, the same shall be deemed and taken to be in full satisfaction and discharge of the mortgage; and the court shall discharge the mortgagor of and from the same accordingly." Upon this statute, the proceedings in ejectment on a mortgage may be stayed by the mortgagor, or his assignee of the equity of redemption, on payment of the principal, interest, and costs, without paying off a bond-debt due to the mortgagee<sup>1</sup>: And if there be any doubt, as to the amount of what is due, the court will refer it to the master, who taxes the costs; and if the debt and costs are not paid, the plaintiff must proceed in the action, and cannot have an attachment<sup>2</sup>. But the court

<sup>1</sup> See 1 Str. 413.

<sup>2</sup> 2 Str. 1220.

<sup>3</sup> 2 Str. 1107. Andr. 341. S.C.

will

will not stay the proceedings in an ejectment brought by a mortgagee against a mortgagor, on payment of the principal, interest, and costs, if the latter has agreed to convey the equity of redemption to the mortgagee<sup>a</sup>.

In actions for *general* damages, it is a rule that the proceedings cannot be stayed, on making satisfaction to the plaintiff: And accordingly, in an action against the sheriff for a false return to a *fieri facias*, the court will not stay the proceedings, on payment of the money levied<sup>b</sup>. But there are some exceptions to this rule. In *replevin*, for instance, where the defendant avows for rent, the court will stay the proceedings, on bringing it into court, and payment of costs<sup>c</sup>: But the proceedings cannot be stayed, where the avowry is for damage-feasant<sup>d</sup>; because the court in such case have no rule to guide them, in ascertaining the damages. The court in one case, under certain circumstances, stayed the proceedings in an action of *trespass* for seizing goods, on the defendants undertaking to restore the goods, or pay the full value of them, with the costs of the action<sup>e</sup>.

<sup>a</sup> 7 T. R. 185. but see  
1 Wilf. 80. *semb. contra*.

<sup>b</sup> 7 T. R. 335.

<sup>c</sup> 2 Salk. 597. 1 H. Blac. 24.

<sup>d</sup> 8 Mod. 379.

<sup>e</sup> 7 T. R. 53.

But

But this seems to be contrary to their usual practice, in actions of this nature; and in a subsequent case, the court of *exchequer* refused to stay the proceedings in such an action upon the like terms, where it would not end the suit, and particularly as the value of the goods was not admitted <sup>f</sup>.

In *trover* for money, the court will give the defendant leave to bring it into court <sup>g</sup>. And where *trover* is brought for a specific chattel, of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damages above the real value, the court will make an order for staying the proceedings, upon delivering it to the plaintiff, and payment of costs <sup>h</sup>: And this is the more reasonable, as the action of *trover* comes in place of the old action of *detinue*. But the court will not stay the proceedings, where there is an uncertainty, either as to the quantity or quality of the thing demanded; or there is any tort that may enhance the damages above the real value, and

<sup>f</sup> 3 Anstr. 896.

<sup>g</sup> 1 Str. 142.

<sup>h</sup> 3 Bur. 1364. Say. Rep.

80. 2 Eunom. 144, 5. Barnes, 281. Pr. Reg. 260. Caf. Pr.

C. B. 130. S. C. but see

2 Salk. 597. 2 Str. 822. *Id.*

1191. 1 Wils. 23. S. C. Say.

Rep. 120. *contra*.

there

there is no rule whereby to estimate the additional damages<sup>1</sup>. In *trover*, by the assignees of a bankrupt, for a steam-engine, &c. the court made a special rule for staying the proceedings, on delivering to the plaintiffs a part of the goods for which the action was brought, and payment of costs up to that time, provided the plaintiffs would accept thereof in discharge of the action; or otherwise, that the articles delivered should be struck out of the declaration, and the plaintiffs be subject to costs, unless they should obtain a verdict for the remainder of the goods, or prove a deterioration of the part delivered up<sup>2</sup>.

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The *Security* usually given, by the defendant to the plaintiff, on compromising an action, and which is also frequently given where no action is depending, is a *warrant of attorney*; so called, from its authorising the attorney, or attorneys, to whom it is directed, to appear for the defendant, and receive a declaration, in an action to be brought against him; and thereupon to

<sup>1</sup> 3 Bur. 1364.

34 Geo. III. and see 7 T.

<sup>2</sup> *Brunsdon and others, Assignees, &c. v. Austin, T.* R. 54.

confels



confess the same action, or suffer judgment therein to pass by default<sup>1</sup>, &c.

Every warrant of attorney should be given voluntarily, and for a good consideration. Therefore if a warrant of attorney be obtained by fraud<sup>2</sup>, or for a corrupt and usurious consideration<sup>3</sup>, or for securing an annuity which is void by the annuity act<sup>4</sup>, the court will order it to be delivered up, and set aside the judgment and proceedings, if any, which have been had under it. So if a warrant of attorney be given by an infant, or by one of several executors to confess a judgment against all<sup>5</sup>, the court will order it to be delivered up, &c. But where a feme-covert who lived by herself, and acted as a feme-sole, gave a warrant of attorney to confess a judgment, and afterwards moved to set aside the judgment, because she was covert, the court would not relieve her, but put her to her writ of error<sup>6</sup>.

Where the defendant is in custody by arrest, it is a rule<sup>7</sup>, that no bailiff or sheriff's officer shall presume to exact or take from him,

<sup>1</sup> Append. Chap. XXI. [A]

<sup>2</sup> Doug. 196.

<sup>3</sup> Cowp. 727.

<sup>4</sup> *Ante*, 411.

<sup>5</sup> 1 Str. 26.

<sup>6</sup> 1 Salk. 400.

<sup>7</sup> R. E. 15 Cat. 2. II.

“ any

" any warrant to acknowledge a judgment, but  
 " in the presence of an attorney for the defend-  
 " ant, who shall subscribe his name thereto;  
 " which warrant shall be produced, when the  
 " judgment is acknowledged; and if any bailiff  
 " or sheriff's officer shall offend therein, he shall  
 " be severely punished: And no attorney shall  
 " acknowledge or enter, or cause to be ac-  
 " knowledged or entered, any judgment, by  
 " colour of any warrant, gotten from any de-  
 " fendant, being under arrest, otherwise than as  
 " aforesaid." Upon this rule it was deemed  
 sufficient for the plaintiff's attorney to be pre-  
 sent, and subscribe the warrant, as attorney for  
 the defendant\*: And therefore another rule  
 was made<sup>†</sup>, that " no warrant of attorney ex-  
 " ecuted by any person in custody of a she-  
 " riff or other officer, for the confessing of judg-  
 " ment, shall be valid or of any force, unless  
 " there be present some attorney on the behalf of  
 " such person in custody, to be expressly named  
 " by him, and attending at his request, to inform  
 " him of the nature and effect of such warrant  
 " of attorney, before the same is executed; which

\* 2 Str. 1245.

902. Cowp. 281.

† R. E. 4 Geo. II. 2 Str.

" attorney

"attorney shall subscribe his name as a witness  
"to the due execution thereof."

The object of these rules was not merely to procure the attendance of an attorney, to explain the nature of the instrument to be executed, but also to advise the defendant confidentially and as a friend; and rules thus framed for the protection of a prisoner, cannot be waived by him, when in a situation where he is incapable of exercising his judgment: Therefore, when a defendant in custody executes a warrant of attorney to confess a judgment, there must be an attorney present on his part; the presence of the plaintiff's attorney being insufficient, though the defendant consent to his acting as his attorney also. And the above rules have been construed to extend to warrants of attorney executed abroad.

But still it is sufficient, if there be an attorney present, on behalf of the defendant, though he be not an attorney of the same court, in which the judgment is to be entered. And the rules only extend to warrants of attorney given by a defendant in custody, upon *mesne* process, in a civil action, to a plaintiff at whose suit

" 7 T. R. 8.    " 2 Str. 1247.    " 1 Str. 530.

he is in custody: Therefore where a warrant of attorney is given by a defendant in custody upon process of *execution*\*, or upon criminal process, or to a third person, at whose suit the defendant is not in custody, an attorney's presence is unnecessary. And where a warrant of attorney was executed in the presence of an attorney's clerk, and it appeared from the defendant's affidavit that he was the more induced to execute it, because he had been informed, that if he did execute it under an arrest, and without his attorney being present, it would be void, the court refused to set aside the proceedings\*.

On the other hand, though the case is not strictly within the rule, yet the court will sometimes interpose, and give relief, under particular circumstances; for it is the province of the court to guard against the arts of designing men, practised upon persons under the pressure of distress and imprisonment. Thus if it could be shewn, that a party, even in execution, had been prevailed on to acknowledge a judgment, for

\* 2 Str. 1245. Cowp. 281. \* 5 Mod. 144. 2 Ld.  
1 T. R. 715. 7 T. R. 19. Raym. 797. 3 Bur. 1792.  
S. P. Cowp. 142. 2 T. R. 142.  
\* 4 T. R. 433. \* Cowp. 142.

more money than was really due, the court would give relief under the circumstances<sup>b</sup>; because cases of fraud and imposition are exceptions to all rules whatsoever. And in a late case<sup>c</sup>, where interlocutory judgment being signed against a prisoner in custody of the marshal, the plaintiff's attorney took a *cognovit* from him for 200 l. with a defeazance on paying 49 l. (the real debt) and costs, but no attorney was present on the part of the defendant; though this case was not strictly within the rule, which only mentions prisoners in custody of sheriff's officers, yet the court interfered for the relief of the prisoner.

By the course of the court, a warrant of attorney given to confess a judgment is not revocable<sup>d</sup>; and if the party giving, endeavour to revoke it, the court will notwithstanding give the other party leave to enter up judgment. But the death of either party is, generally speaking, a countermand of the warrant of attorney<sup>e</sup>: And therefore, upon a motion to enter up judgment on an old warrant

<sup>b</sup> Cowp. 281.

<sup>c</sup> 3 T. R. 616.

<sup>d</sup> 2 Ld. Raym. 766, 850. 310.

<sup>e</sup> 1 Salk. 87. 7 Mod. 93. S. C.

<sup>f</sup> Co. Lit. 32. b. 1 Vent.



of attorney, if it appear to the court, that either party is dead, they will not grant the motion<sup>f</sup>. Yet if either party die in vacation, within a year after giving the warrant of attorney, judgment may be entered up of course, at any time after, in that vacation<sup>g</sup>, and it will be a good judgment, at common law, as of the preceding term, though it be not so upon the statute of frauds, in respect of purchasers, but from the signing<sup>h</sup>. And even where the party dies after the year, if the court can be prevailed upon to grant a rule for entering up judgment, they will not afterwards set it aside<sup>i</sup>. Where there are several parties, and one of them dies before judgment, it may be entered by or against the survivors<sup>k</sup>.

When a warrant of attorney is given to a feme-sole, who marries before judgment, the authority is not deemed to be countermanded or revoked; because it is for the husband's ad-

<sup>f</sup> 2 Str. 718, 1081. Vin. S. C. *Id.* 93. 6 T. R. 368. Abr. tit. *Judgment*, W. 7. 7 T. R. 21.

Barnes, 270.

<sup>g</sup> 2 Str. 882, 1081. Vin.

<sup>h</sup> T. Raym. 18. 2 Ld. Abr. tit. *Judgment*, W. 7. Raym. 766, 850. 1 Salk. Barnes, 270.

<sup>i</sup> 87. 7 Mod. 93. S. C. 2 Str. <sup>k</sup> 1 Wils. 312. Say. Rep. 5. 882. Barnes, 267, 8. S. C. Barnes, 40, 53. but see

<sup>h</sup> 1 Salk. 401. 7 Mod. 39. Barnes, 45. *contra*.

vantage:

vantage<sup>1</sup>: And therefore, notwithstanding the marriage, judgment may be entered up, in the names of the husband and wife. But, in order to warrant this entry, there should be a previous application to the court, founded on an affidavit of the marriage<sup>m</sup>. And in one case<sup>n</sup>, it was ruled upon motion, that if a woman give a warrant of attorney, and then marry, the plaintiff may file a bill, and enter judgment, against both husband and wife, by the practice of the court. But in a subsequent case<sup>o</sup>, it is said, that if a feme-sole give a warrant to confess a judgment, and marry before it be entered, the warrant is countermanded, and judgment shall not be entered against husband and wife, for that would charge the husband<sup>p</sup>.

If a warrant of attorney be given, to appear and confess judgment of a particular term, the judgment should be entered accordingly

<sup>1</sup> 12 Mod. 383. 7 Mod. 53.

<sup>1</sup> Salk. 117. S. C.

<sup>m</sup> 3 Burr. 1471.

<sup>n</sup> 1 Show. 91. Say. Rep. 6.

<sup>3</sup> Bur. 1470. S. C. cited.

<sup>o</sup> 1 Salk. 399. 7 Mod. 53.

<sup>8</sup> C. cited.

<sup>p</sup> *Tamen quare*; for it seems

as reasonable, that he should be charged in this case, as for a bond or other debt, which he is liable for during the coverture, though not after. 1 Salk. 117. cites 1 Roll. Abr. 351. F. 1. G. 2. F. N. B. 120. F.

of that term, and cannot be entered of any other<sup>a</sup>. But if the warrant of attorney be given, to appear and confess judgment generally, or (as is most usual) of a particular or any subsequent term, judgment may be entered of any term after giving the warrant<sup>b</sup>. Where a warrant of attorney was given in vacation, and judgment was entered up thereon, as of the preceding term, the court ordered the judgment to be set aside, for the danger that might otherwise ensue to purchasers<sup>c</sup>. And where a warrant of attorney was given to confess judgment, at the suit of an executor, as of the preceding term, when the testator was living, and the judgment was entered up accordingly, the court held it to be irregular<sup>d</sup>; for the attorney could have no authority to appear in that term, at the suit of the executor, and the judgment must be considered as of that term, though to other purposes the day of signing is material.

Within a year and a day next after the date of the warrant, judgment may be entered of course, without applying to the court or a

<sup>a</sup> 1 Mod. 1. 7 Mod. 53. frauds, by which judgments

<sup>b</sup> *Id. ibid.* affect purchasers, only from

<sup>c</sup> 1 Sid. 222. but note, this the time of signing.

was before the statute of <sup>d</sup> 2 Str. 1121.

judge.

judge. But if it be not entered within that time, the court must be moved, in term time<sup>7</sup>, or if the warrant of attorney be not above *ten* years old<sup>8</sup>, an application may be made to a judge, in vacation<sup>9</sup>, for leave to enter up the judgment, on an affidavit of the due execution of the warrant of attorney, that the debt, or part of it, is still due, and that the parties are living<sup>10</sup>. On making the application, the court or judge expect to be informed, when the defendant was alive: If in town, it should appear that he was alive within two or three days, or if in the country, within a week or ten days before the application is made<sup>11</sup>; and if made to the court, any time during the same term is deemed sufficient; for though he should be since dead, yet the judgment, by relation back to the first day of the term, will appear to have been given in his life-time.

The judgment upon a warrant of attorney, being in *debt*, is always final; and signed in like manner as a final judgment by confession

<sup>7</sup> 7 Mod. 94. 6 Mod. 212.

<sup>8</sup> Imp. K. B. 410.

<sup>9</sup> Will. 36. *arg.*

<sup>10</sup> Append. Chap. XXI.

<sup>11</sup> Imp. K. B. 410. *Ante*, [B].

404. *in notis.*

<sup>12</sup> Imp. K. B. 453.



or default in an adverse suit, which will be treated of in the next chapter,

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In order to *compound* a penal action, an application must be made to the court wherein it is depending, founded upon the statute 18 Eliz. c. 5. § 3.\* by which it is enacted, that “no  
“common informer or plaintiff shall or may  
“compound or agree, with any person or persons that shall offend, or that shall be sur-  
“mised to offend, against any penal statute,  
“for an offence committed, or pretended to be  
“committed, but after answer made in court,  
“to the information or suit in that behalf ex-  
“hibited or prosecuted; nor after answer, but  
“by the order or consent of the court, in which  
“the same information or suit shall be depend-  
“ing; upon the pains and penalties therein set  
“down and declared.” But this statute extends only to *common* informers, and not where the penalty is given to the party *grieved*†.

The application for leave to compound is made by consent, upon an affidavit, setting forth

\* Made perpetual by the  
27 Eliz. c. 10.

† 1 Salk. 30. and see the  
statute, § 6.



the nature of the action, the state of the cause, the agreement of the parties, and that no more than a certain sum is given or taken<sup>b</sup>, &c. which application should regularly be made in an early stage of the cause; but under favourable circumstances, it may be made after verdict<sup>c</sup>: And in one case, where the defendant was in execution, the court, on an affidavit of his poverty, gave the plaintiff leave to compound with him<sup>d</sup>. Upon the application being made, it is in the discretion of the court to give or withhold their leave to compound<sup>e</sup>; and it was refused by the court in a late case, where an action was brought on the statute 25 Geo. III. c. 36. for keeping a disorderly house<sup>f</sup>. Where leave is given to compound a penal action, it is a general rule, that the king's half of the composition shall be paid into the hands of the master of the crown-office, for the use of his majesty<sup>g</sup>; which is now usually done before the rule is drawn up<sup>h</sup>. And where a defendant in

<sup>b</sup> Imp. K. B. 646. and see Append. Chap. XXI. [C].

<sup>c</sup> 5 T. R. 98. Pul. & Bos.

18.

<sup>d</sup> 1 Str. 167.

<sup>e</sup> 1 Will. 79, 130.

<sup>f</sup> *Bellis v. Beale*, M. 38 G.

III. and see 2 Blac. Rep.

1157.

<sup>g</sup> 4 Bur. 1929. and see

2 Blac. Rep. 1154.

<sup>h</sup> Imp. K. B. 646.

a penal action obtained a rule to stay proceedings, on paying a sum agreed upon between him and the plaintiff, the court considered it as an undertaking by him to pay that sum; and for the non-payment of it, granted an attachment<sup>1</sup>. But for preventing any doubt in future, an order was made, that every rule to be drawn up for compounding any *qui tam* action, do express, that the defendant doth undertake to pay the sum, for which the court has given him leave to compound such action<sup>1</sup>.

<sup>1</sup> 5 T. R. 257.

<sup>1</sup> R. E. 33 G. III.

## CHAP. XXII.

*Of JUDGMENT by CONFESSION, and  
DEFAULT.*

WHEN the defendant, having no merits, cannot compromise or compound the action, it is usual for him to confess it, or let judgment go by default.

The objects proposed by confessing an action are two-fold; first, in an action for damages, to save the expence of executing a writ of inquiry, and secondly, to obtain terms, such as a stay of execution, &c. And the confession, or as it is usually called, from the entry of it, a *cognovit actionem*, is either before or after plea pleaded; in the latter case, the plea being withdrawn, it is called a confession, or *cognovit actionem, relicta verificatione*.

In general, the confession is made after declaration, and before plea; and written on the declaration or back of the inquiry, or on plain paper, thus: "I confess this action, or, if in  
" *debt,*

“*debt*, the debt in this cause, and that the  
 “ plaintiff hath sustained damages to such an  
 “ amount, besides his costs and charges, to be  
 “ taxed by the master ;” then follow the terms,  
 if any are agreed on, as that “ no judgment  
 “ shall be entered up, or execution issue, until  
 “ default shall be made in payment of the debt  
 “ or damages and costs, by a certain day, and  
 “ that no writ of error shall be brought, or  
 “ bill in equity filed ; but that in case default  
 “ shall be made, the plaintiff shall be at liberty  
 “ to enter up judgment, and take out execution,  
 “ for the debt or damages and costs, together  
 “ with sheriff’s poundage, and all other inci-  
 “ dental expences.” Where the confession is  
 after plea pleaded, the defendant’s attorney  
 ought to come in person before the master, to  
 withdraw it<sup>b</sup>.

Again, the confession is either of the *whole*,  
 or *part* of the cause of action. If it be of the  
 whole, and not upon terms, the plaintiff’s at-  
 torney may immediately sign final judgment,  
 and take out execution thereon ; but if it be not  
 of the whole, he can only sign judgment for  
 the part confessed, and the action must pro-

<sup>a</sup> Append. Chap. XXII.      <sup>b</sup> 1 *Ld. Raym.* 345.  
 [A].

ceed for the residue. Where a judgment is confessed upon terms, it being in effect but a conditional judgment, the court will take notice of it, and see the terms performed: but where the judgment is acknowledged absolutely, and a subsequent agreement made, this does not affect the judgment, and the court will take no notice of it, but put the party to his action on the agreement<sup>c</sup>. And it has been said<sup>d</sup>, that the court cannot hold plea of an agreement upon motion: But it is usual in practice, to set aside a judgment entered up, and execution taken out, contrary to the agreement of the parties, at the time of confessing the judgment<sup>e</sup>.

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Judgment by *default*, which is an implied confession of the action, is either by *nil dicit*, where the defendant appears, but says nothing in bar or preclusion of the action; or by *non sum informatus*, where his attorney says, he is not informed of any answer to be given thereto<sup>f</sup>. Judgment by *nil dicit* is either for want of any plea at all; or for want of a plea adapted to the nature of the action, or

<sup>c</sup> 1 Salk. 400.

Blac. Rep. 943.

<sup>d</sup> *Id. ibid.*

<sup>f</sup> Append. Chap. XXII.

<sup>e</sup> 6 Mod. 14. and see 2 [B].

circum-



circumstances of the case; or for not pleading in due time, or proper manner.

On the expiration of the time for pleading, a rule to plead having been given, and a plea demanded, when necessary, the plaintiff's attorney should *search* for a plea, if not delivered to him, with the clerk of the papers, who receives special pleas, and with the clerk of the judgments, who keeps the general-issue book, at the king's bench office; and if no plea be delivered, or found at either of those offices, the plaintiff's attorney may sign judgment, as for want of a plea. And judgment may be signed in like manner, if the defendant do not rejoin<sup>2</sup>, plead to a new assignment, or join in demurrer, when necessary; or do not return the paper, or demurrer-book in due time.

When the defendant pleads a plea not adapted to the nature of the action, as *nil debet* in *assumpsit*<sup>3</sup>, &c. the plaintiff may consider it as a nullity, and sign judgment. So if the defendant, after craving oyer of a deed, do not set forth the whole of it, the plaintiff may sign judgment, as for want of a plea<sup>1</sup>. But the plea of not-

<sup>2</sup> 5 T. R. 152.

<sup>3</sup> Barnes, 257.

<sup>1</sup> 4 T. R. 370. *Slater v. Horne*, E. 34 G. III. S. P.

guilty,

guilty, in an action of debt on a penal statute, is not such a nullity, as will warrant the plaintiff in signing judgment <sup>k</sup>. If the defendant, when under an order to plead *issuably*, put in a plea which, though informal, goes to the substance of the action, the plaintiff cannot sign judgment as for want of a plea <sup>l</sup>: And, in general, where the defendant pleads an improper plea, the safest course is not to sign judgment, but to demur, or move the court to set it aside.

If the defendant plead a judgment recovered, or other plea that is not *issuable*, after a judge's order for time to plead, on the terms of pleading *issuably*, the plaintiff may sign judgment, as for want of an *issuable* plea <sup>m</sup>. And he may also sign judgment, where the defendant pleads in abatement, without an affidavit of the truth of his plea, or after the expiration of four days inclusive, from the delivery, or filing and notice of declaration <sup>n</sup>; or if he plead a tender, without paying the money into court <sup>o</sup>: or where a plea of *solvit ad diem*, which ought to be delivered to the plaintiff's attorney, is entered in the general-issue book <sup>p</sup>.

<sup>k</sup> 1 T. R. 462.

<sup>l</sup> 5 T. R. 152.

<sup>m</sup> 1 Bur. 59.

<sup>n</sup> 1 T. R. 277, 689.

<sup>o</sup> 1 Str. 638.

<sup>p</sup> 5 T. R. 661.

The plaintiff may *waive* a judgment by default<sup>o</sup>; or if *irregular*, the defendant may move the court to set it aside: But the motion for this purpose must be made in term-time, or notice given of it in vacation, two days at least before the day appointed for executing the inquiry. And even though the judgment be *regular*, yet where the plaintiff has not lost a trial, the court on motion will set it aside, upon an affidavit of merits, (which may in general be made by the attorney<sup>p</sup>;) pleading *issuably instante*<sup>q</sup>, and payment of costs<sup>r</sup>: And the court will do this in *ejectment*, as well as in other actions<sup>s</sup>. But they will not set aside a *regular* judgment, to give the defendant advantage of a nicety in pleading<sup>t</sup>; or to let him in to plead the statute of limitations<sup>u</sup>; nor an *irregular* judgment, after the defendant has given a *cognovit*<sup>v</sup>.

A judgment by default is *interlocutory* or *final*. Where the action sounds in damages, as *assumpsit*, *covenant*, *trover*, *trespass*, &c. the

<sup>o</sup> T. 23 Car. I. K. B.

<sup>p</sup> Per Cur. H. 37 G. III.

<sup>q</sup> *Instante* means within twenty-four hours. *Pryce v. Hodgson*, E. 35 G. III.

<sup>r</sup> 1 Salk, 402. 2 Salk, 518.

2 Str. 823. 1 Bur. 568.

<sup>s</sup> 2 Str. 975. 4 Bur. 1996.

<sup>t</sup> 2 Str. 1242.

<sup>u</sup> 1 Blac. Rep. 35. But see Pul. & Bosq. 228.

<sup>v</sup> 7 T. R. 206. *Ante*, 125. judgment

judgment is only interlocutory, that the plaintiff ought to recover his damages, leaving the amount of them to be afterwards ascertained: And the judgment for the plaintiff, in these actions, is also interlocutory, on demurrer or *nul tiel record*. In *debt*, the judgment is commonly said to be *final*; but where an action is brought on a judgment, the plaintiff may have a writ of inquiry, after judgment by default, to recover interest by way of damages, for the detention of the debt. And by the statute 8 & 9 W. III. c. 11. § 8. it is enacted, that “in all actions  
“upon any bond or bonds, or on any penal-  
“sum, for non-performance of any covenants or  
“agreements, in any indenture, deed, or writing  
“contained, if judgment shall be given for the  
“plaintiff on a demurrer, or by confession, or  
“*nihil dicit*, the plaintiff upon the roll may  
“suggest as many breaches of the covenants  
“and agreements as he shall think fit; upon  
“which shall issue a writ to the sheriff of that  
“county where the action shall be brought, to  
“summon a jury to appear before the justices  
“or justice of assize, or *nisi prius*, of that  
“county, to inquire of the truth of every one

“ of those breaches, and to assess the damages  
 “ that the plaintiff shall have sustained thereby;  
 “ in which writ it shall be commanded to the  
 “ said justices or justice of assize, or *nisi prius*,  
 “ that he or they shall make return thereof, to  
 “ the court from whence the same shall issue, at  
 “ the time in such writ mentioned: and in case  
 “ the defendant or defendants, after *such judg-*  
 “ *ment* \* entered, and before any execution exe-  
 “ cuted, shall pay into the court where the ac-  
 “ tion shall be brought, to the use of the plain-  
 “ tiff or plaintiffs, or his or their executors or  
 “ administrators, such damages so to be assessed,  
 “ by reason of all or any of the breaches of  
 “ such covenants, together with the costs of  
 “ suit, a stay of execution of the said judgment  
 “ shall be entered upon record; or if by reason  
 “ of any execution executed, the plaintiff or  
 “ plaintiffs, or his or their executors or ad-  
 “ ministrators, shall be fully paid or satisfied  
 “ all such damages so to be assessed, together  
 “ with his or their costs of suit, and all reason-  
 “ able charges and expences for executing the  
 “ said execution, the body, lands, or goods of

\* The judgment here seems to be the common-law  
 spoken of, by reference to a judgment for the penalty.  
 former part of the statute,



"the defendant, shall be thereupon forthwith  
"discharged from the said execution, which  
"shall likewise be entered upon record: But  
"notwithstanding, in each case, such judgment  
"shall remain, continue, and be as a further  
"security to answer to the plaintiff or plaintiffs,  
"and his or their executors or administrators,  
"such damages as shall or may be sustained,  
"for further breach of any covenant or cove-  
"nants in the same indenture, deed, or writing  
"contained."

This statute was made in favour of defendants, and is highly remedial, being calculated to protect them against the payment of more money than is justly due, and to take away the necessity of proceedings in equity, to obtain relief against an unconscientious demand of the whole penalty, in cases where small damages only have accrued: And accordingly, it has received a very liberal construction. Where covenants and agreements are contained in the condition of a bond, they are held to be within the statute, as well as where they are in a different instrument; and though it was formerly doubted<sup>2</sup>, yet it is now settled, that the statute is *compul-*

<sup>1</sup> 5 T. R. 636.

<sup>2</sup> Com. Rep. 376.

*sory* on the plaintiff, to proceed in the method it prescribes<sup>a</sup>. But the provisions of the statute do not extend to bonds conditioned for the payment of money, which are provided for by the statute 4 Ann. c. 16. And it seems doubtful, whether they extend to bonds conditioned for the performance of a single act, as for the defendant's appearance on a bail-bond. Where judgment is given for the plaintiff on an issue of *nul tiel record*, or entered up on a warrant of attorney, it does not seem to be within the statute.

In cases where the statute applies, judgment is signed for the penalty, as at common law<sup>b</sup>; but it can only stand as a security for the damages sustained: And after signing judgment, the plaintiff must proceed on the statute, by suggesting breaches on the roll<sup>c</sup>, of which it is usual to give a copy to the defendant, with notice of inquiry for the sittings or assizes. A writ of inquiry is then sued out<sup>d</sup>, and delivered to the sheriff, who summons the jury; and the

<sup>a</sup> 2 Will. 377. Say. Dam.  
67. S. C. Cowp. 357. 5 T. [C].  
R. 538, 636.

<sup>b</sup> 2 Bur. 825. Cowp. 357.

<sup>c</sup> Append. Chap. XXII.

<sup>d</sup> *Id.* [D].

writ being executed, is returned to the court, with the finding of the jury, and execution is awarded for the damages and costs.

An *interlocutory* judgment is signed on treble-penny stamped paper, with the clerk of the judgments, in the king's bench office; an *incipitur* being first entered on a roll, of the same term with the declaration: *Final* judgment is signed on a double half-crown stamped paper; and no rule for judgment being necessary, the plaintiff may immediately proceed to tax his costs, and take out execution.

After an interlocutory judgment, a writ of inquiry of damages is in general awarded; which is a judicial writ, directed to the sheriff of the county where the action is laid\*; setting forth the proceedings which have been had in the cause; "and that the plaintiff ought to recover his damages, by occasion of the premises; But because it is unknown what damages he hath sustained by occasion thereof, the sheriff is commanded, that by the oath of twelve honest and lawful men of his county, he diligently inquire the same; and return the inquisition into court<sup>f</sup>."

\* 2 Lil. P. R. 721.

<sup>f</sup> Append. Chap. XXII. [E].

In an action on the case upon two promises, there was judgment by default as to the first promise, and as to the second a *nolle prosequi*: A writ of inquiry was taken out, to inquire what damages the plaintiff had sustained, *by occasion of the premises*; and upon the return of this, it was moved to amend the writ, and make it, *by occasion of the not performing of the first promise*: And upon the authority of *Baker against Campbell*<sup>2</sup>, the writ was amended in this case; the record of the judgment by default being a warrant to amend by <sup>h</sup>.

The writ of inquiry should be returnable on a general return, or day certain, according to the nature of the proceedings: if by *original*, on a general return; if by *bill*, on a day certain. But where, in an action by bill against an attorney, the writ of inquiry was returnable on a general return, it was holden not to be error; but only a mis-continuance, and cured by the statutes of jeofails<sup>1</sup>.

A writ of inquiry of damages is a mere inquest of office, to inform the conscience of the court; who, if they please, may themselves

<sup>2</sup> E. 4 Ann. B. R.

<sup>1</sup> 2 Str. 947. Say. Rep.

<sup>h</sup> 1 Str. 684. and see Cas. 245.

*temp.* Hardw. 314.

assess the damages<sup>k</sup>: And it is accordingly the practice, in actions upon promissory notes and bills of exchange, instead of executing a writ of inquiry, to apply to the court, for a rule to shew cause, why it should not be referred to the master, to see what is due for principal and interest, and why final judgment should not be signed for that sum, without executing a writ of inquiry; which rule is made absolute, on an affidavit of service, unless good cause be shewn to the contrary<sup>l</sup>. And a similar rule may be obtained in actions on covenants, for the payment of a sum certain<sup>m</sup>; or on an award<sup>n</sup>. This practice however is confined to actions upon promissory notes and bills of exchange, &c. where the *quantum* of damages depends on figures, and may be as well ascertained by the master, as before a jury: And therefore where the defendant had suffered judgment by default, in an action of *assumpsit*, on a foreign judgment, the court refused to make the

<sup>k</sup> See 1 H. Blac. 542. and of increasing them. Say. the several cases there cited. *Dam.* 173, &c.  
And, in confirmation of this doctrine, it may be observed, <sup>l</sup> 4 T. R. 275. and see 1 H. Blac. 252, 529, 541.  
that the courts have the <sup>m</sup> Doug. 316.  
power of setting aside inquiries for small or excessive <sup>n</sup> *Meggison* and ———, per *Cur.* damages; and in some cases,



rule absolute, for a reference to the master; saying, this was an attempt to carry the rule further than had yet been done, and as there was no instance of the kind, they would not make a precedent for it°. In a subsequent case², the court refused to make the rule absolute, in an action upon a bill of exchange, for *foreign* money; the value of which is uncertain, and can only be ascertained by a jury³. And such a rule cannot be had in *assumpsit*, for a sum certain, due upon an agreement⁴; or in an action upon a bottomree bond⁵. But where there was a demurrer to one count on a bill of exchange, and judgment for the plaintiff, and a plea to other counts, on which issue was joined, the court referred it to the master, to see what was due to the plaintiff on the former⁶.

Where the jury, upon the trial of an issue, omit to assess the damages, the omission may in some cases be supplied by a writ of inquiry⁷: As to which it seems, that where the matter omitted to be inquired by the princi-

° 4 T. R. 493.

² 5 T. R. 87.

³ Cro. Eliz. 536. Cro. Jac. 617.

⁴ Per Cur. H. 37 G. III. 118.

⁵ *Palin v. Nicholson*, E.

38 G. III.

⁶ 7 T. R. 473.

⁷ *Cheyney's case*, 10 Co.

pal jury, is such as goes to the very point of the issue, and upon which, if it be found by the jury, an attaint will lie against them, by the party, if they have given a false verdict; there such matter cannot be supplied by a writ of inquiry, because thereby the party may lose his action of attaint, which will not lie upon an inquest of office<sup>v</sup>.

Thus in *detinue*, where the jury omitted to assess the value of the goods, the court refused to supply the omission, by a writ of inquiry<sup>w</sup>. And so where the jury who try the issue in *replevin*, upon a distress for rent, omit to inquire of the rent in arrear, and value of the goods or cattle distrained, pursuant to the statute 17 Car. II. c. 7. no writ of inquiry can be afterwards awarded, to supply the omission<sup>x</sup>: For by the words of the statute, these matters are to be inquired of by the *same* jury who try the issue<sup>y</sup>.

But where the matter omitted to be inquired by the principal jury, doth not go to

<sup>v</sup> Carth. 362. 2 Str. 1052. 1 Lev. 255. 2 Str. 1052.

<sup>w</sup> 1 Sid. 246. T. Raym. Gilb. Diff. 165.

124. 1 Keb. 882.

<sup>y</sup> 1 Salk. 205, 6. Cas.

<sup>x</sup> 1 Sid. 380. T. Raym. temp. Hardw. 141, 295.

170. 1 Vent. 40. 2 Keb. 408.

the point in issue, or necessary consequence thereof, but is merely collateral, as the four usual inquiries on a *quare impedit*<sup>2</sup>, there such matter may be supplied by a writ of inquiry, without any damage to the party; because if the same had been inquired of by the principal jury, it would have been, as to those particulars, no more than an inquest of office, upon which an attaint will not lie<sup>3</sup>.

Thus, where the parties being at issue in *assumpsit*, a demurrer was joined upon the evidence, and the jury discharged, without assessing the damages; and afterwards judgment was given for the plaintiff, and a writ of inquiry of damages awarded; the court held, that though the same jury might have assessed the damages conditionally, yet it may be as well done by a writ of inquiry of damages, when the demurrer is determined; and the most usual course is, when there is a demurrer upon evidence, to discharge the jury, without further inquiry<sup>4</sup>.

So in *trespass* or *replevin*, against *overseers* of the poor, acting *virtute officii*, if the plain-

<sup>2</sup> *Cheyney's case*, 10 Co. 118.

<sup>3</sup> Carth. 362.

<sup>4</sup> Cro. Car. 143.

tiff be nonsuit<sup>e</sup>, or have a verdict against him<sup>d</sup>, and the jury are discharged, without inquiring of the treble damages, pursuant to the statute 43 Eliz. c. 2. § 19. the defect may be supplied by a writ of inquiry; because such inquiry is no more than an inquest of office. In such case, as a ground for awarding a writ of inquiry, it is necessary to enter a suggestion upon the roll, that the defendants were overseers of the poor; and that the action was brought against them, for something done by virtue of their office<sup>e</sup>.

The writ of inquiry may be executed, on due notice, before the sheriff or his deputy<sup>f</sup>; or by leave of the court, under special circumstances, before the chief justice<sup>g</sup>, or a judge of assize, as an assistant to the sheriff<sup>h</sup>: And where the writ of inquiry is executed before the chief justice, or a judge of assize, it is usual to move the court, for the sheriff to return a good jury<sup>i</sup>. But unless some matter

<sup>e</sup> 1 Rol. Rep. 272. 2 Rol.

Rep. 112. 5 Mod. 76, 7, 118.

Carth. 362. 1 Salk. 205.

Skin. 595. Comb. 344. S. C.

<sup>d</sup> Caf. temp. Hardw. 138.

<sup>e</sup> 2 Str. 1021. S. C. Say, Rep.

214. 3 Wils. 442.

<sup>e</sup> Caf. temp. Hardw. 138.

Say, Rep. 214.

<sup>f</sup> 2 Wils. 379.

<sup>g</sup> 12 Mod. 519. 1 Str. 612.

<sup>h</sup> 2 Str. 853. Barnes, 233.

<sup>i</sup> 12 Mod. 616.

<sup>i</sup> Imp. K. B. 407.

of law is likely to arise in the course of the inquiry, the court will not give leave to have it executed before a judge, merely on account of the importance of the facts<sup>k</sup>.

The notice of inquiry should be in writing<sup>l</sup>; and if the defendant have appeared, and his attorney be known, it should be delivered to such attorney<sup>m</sup>: But if the defendant have not appeared, or his attorney be unknown, the notice should be delivered to the defendant himself, or left at his last place of abode<sup>n</sup>. If the venue be laid in *London* or *Middlesex*, and the defendant live within forty computed<sup>o</sup> miles from *London*, there must be in general eight days notice of inquiry, exclusive of the day it is given<sup>p</sup>; which notice is also sufficient in country causes: For the statute 14 Geo. II. c. 17. § 4. which requires ten days notice of trial at the assizes, does not extend to notices of inquiry. But where the venue is laid in *London* or *Middlesex*, and the defendant lives above forty computed miles from *London*,

<sup>k</sup> *Boddington v. Boddington*; E. 37 G. III. but see 2 Sel. 12.

<sup>l</sup> R. M. 4 Ann. (c).

<sup>m</sup> Say. Rep. 133.

<sup>n</sup> Say. Rep. 133.

<sup>o</sup> 2 Str. 954, 1215.

<sup>p</sup> Sty. P. R. tit. *Notice*, 421:

6 Mod. 146. R. M. 4 Ann. (c). 8 Mod. 21.

there



there must be *fourteen* days notice of inquiry : And *Sunday* is to be accounted a day in these notices, unless it be the day on which the notice is given<sup>1</sup>. Where the plaintiff, upon any pleading of the defendant, tenders an issue, and the paper-book is made up, and delivered with notice of trial, and the defendant strikes out the *similiter*, and returns the book with a demurrer, if judgment be given thereon for the plaintiff, the defendant's attorney shall be obliged to accept of notice of executing the writ of inquiry, from the time of giving the notice of trial<sup>2</sup>. *Short* notice of inquiry is the same as *short* notice of trial: And where a term's notice of trial is required, there must, at the same distance of time, be the like notice of inquiry<sup>3</sup>.

Where the inquiry is to be executed before the chief justice, or a judge of assize, the notice should be given for the sittings, or assizes, generally; but otherwise the notice should express the particular time and place of executing it<sup>4</sup>. A writ of inquiry may be executed at any time before, or on the day it is returnable<sup>5</sup>;

<sup>1</sup> R. M. 4 Ann. (c). 8 Mod.  
21.

<sup>2</sup> R. H. 8 G. I.

<sup>3</sup> 2 Str. 1100.

<sup>4</sup> Say. Rep. 181. and see  
Append. Chap. XXII. [F].

<sup>5</sup> 2 Ld. Raym. 1449.

but

but not on a *Sunday*<sup>u</sup>: and where the notice was to execute it *by* ten o'clock, the court set it aside for uncertainty<sup>v</sup>. The usual way is to give notice, that the inquiry will be executed *between* two certain hours<sup>w</sup>; as between ten and twelve o'clock in the forenoon, or between four and six in the afternoon, of a particular day, on or before the return of the writ. On a notice of inquiry so given, the party is not tied down to the precise time fixed by the notice; for the sheriff may have prior business, which may last beyond it: Therefore where notice was given of executing an inquiry, between ten and twelve o'clock, and the irregularity complained of was, that the defendant and his witnesses attended till twelve, and after the hour was elapsed, and they were gone, the writ was executed; the court refused to set aside the inquisition, conceiving it was clearly a trick of the defendant's attorney, to leave the place immediately after the hour was passed<sup>x</sup>.

With regard to the *place* of executing an inquiry, it must be executed within the county where the action is laid. In *Middlesex*, inquiries are usually executed in the morning

<sup>u</sup> 1 Str. 387.

<sup>v</sup> 2 Str. 1142.

<sup>w</sup> Say. Rep. 181.

<sup>x</sup> Doug. 198.

during

during term-time, at the King's Arms Tavern, *Palace-Yard, Westminster*: and in the afternoon during term-time, as well as in vacation, at the sheriff's office in *Took's-court, Curfitor-street, Chancery-lane*<sup>1</sup>. In *London*, they are executed in term-time, as well as vacation, at the Secondary's office, No. 10, *Grocers'-hall court in the Poultry*<sup>2</sup>: And the notice should be given accordingly. Notice of inquiry may be *continued* or *countermanded*, in like manner as notice of trial<sup>3</sup>.

In *London* and *Middlesex*, the writ must be left at the sheriff's office, the day before the time appointed for its execution<sup>4</sup>: And if either party propose to attend by counsel, he should give notice thereof to his adversary, or he will not be allowed for it in costs<sup>5</sup>. The execution of the writ may be *adjourned* by the sheriff, after it is entered upon<sup>6</sup>. And if the plaintiff do not proceed to execute the inquiry according to notice, or countermand in time, the defendant, on an affidavit of at-

<sup>1</sup> Imp. K. B. 402.

<sup>2</sup> Imp. K. B. 406. and see

<sup>3</sup> *Id.* 402, 3. and see Append. Chap. XXII. [G].

Append. Chap. XXII. [H].

<sup>4</sup> 2 Str. 853, 1259.

<sup>5</sup> R. H. 23 G.III.

tendance

tendance and necessary expences, shall have his costs, to be taxed by the master<sup>d</sup>.

Letting judgment go by default is an admission of the cause of action: And therefore, where the action is founded on a contract, the defendant cannot give in evidence that it was fraudulent<sup>e</sup>. So in an action on a promissory note or bill of exchange, the note or bill need not be proved, though it must be produced before the jury, in order to see whether any money appears to have been paid upon it<sup>f</sup>. And where an action was brought on a policy of assurance, on a foreign ship, wherein there was a stipulation, that the policy should be deemed sufficient proof of interest; the plaintiff, on the writ of inquiry, was only bound to prove the defendant's subscription to the policy, without giving any evidence of interest<sup>g</sup>.

On the return-day of the inquiry, the plaintiff should give a rule for judgment, with the clerk of the rules, which expires in four days<sup>h</sup>. And on the expiration of such rule<sup>i</sup>, the sheriff

<sup>d</sup> 1 Str. 317. 2 Str. 728.  
R. H. 8 G. I. (a).

<sup>e</sup> 1 Str. 612.

<sup>f</sup> 2 Str. 1149. Barnes, 233.

<sup>g</sup> 3 Will. 155. Doug. 316.

<sup>h</sup> 3 T. R. 301. 1 H. Blac. 543.

<sup>i</sup> Doug. 315.

<sup>a</sup> 1 Salk. 399. Imp. K. B. 304. And see Append. Chap. XXII. [I].

<sup>1</sup> 1 Salk. 399. Imp. K. B.

399, 404.

being

being called upon for his return, will deliver it, with the inquisition, to the plaintiff's attorney; who gets the inquisition stamped, with a double half-crown stamp, and taxes his costs thereon with the master. Pending the rule for judgment, the defendant may move to set aside the inquisition, for want of due notice<sup>k</sup>; or on account of an objection to the jury, or mode of returning them, as that some of the jury were debtors taken out of prison for the purpose of attending<sup>l</sup>, or that they were returned by the plaintiff's attorney<sup>m</sup>; or for excessive damages<sup>n</sup>. And where the damages are obviously too small, and there has been any contrivance by the defendant<sup>o</sup>, or surprise on the plaintiff<sup>p</sup>, or the sheriff or jury have been mistaken in point of law<sup>q</sup>, but not otherwise<sup>r</sup>, the plaintiff may, at any time before final judgment signed<sup>s</sup>, move to set aside the inquisition. If two defendants in

<sup>k</sup> Sty. P. R.<sup>q</sup> 2 Salk. 647. 1 Str. 425.<sup>l</sup> 4 T. R. 473. but see 3 Mod. 196. 2 Str. 1259.<sup>2</sup> Str. 1159.

6 T. R. 608.

<sup>m</sup> Cowp. 112.<sup>2</sup> 2 Leon. 21. 3 Leon. 117.<sup>n</sup> 2 Leon. 214. 3 Leon. S. C. 2 Str. 940. 2 Barnard, 117. S. C. 3 Bur. 1846. K. B. 177. S. C. Doug. 509.<sup>3</sup> Wilf. 63.

2 T. R. 261.

<sup>o</sup> 2 Salk. 647.<sup>s</sup> *M' Culloch v. Willocks*, M.<sup>p</sup> 1 Str. 515. 2 Str. 1259. 37 G. III.

trespass



trespass suffer judgment by default, and the plaintiff execute writs of inquiry, and take several damages against them separately, it is irregular; and if the plaintiff enter up final judgment for those several damages against the defendants, it is erroneous: But the court will permit the plaintiff to set aside his own proceedings before final judgment, on payment of costs<sup>1</sup>. And if the plaintiff, on the execution of the writ of inquiry, give no evidence on one or more of the counts in his declaration, he may afterwards sue for the causes of action contained in those counts: Thus, where the plaintiff in a former action declared on a promissory note, and for goods sold, but upon executing a writ of inquiry, after judgment by default, gave no evidence on the count for goods sold, and took his damages for the amount of the promissory note only; the court ruled, that the judgment thereupon was no bar to his recovering in a subsequent action for the goods sold<sup>2</sup>.

The want of a writ of inquiry is aided by the statute of Jeofails<sup>3</sup>. And where a writ of inquiry had been many years executed, and costs taxed upon it, but no final judgment en-

<sup>1</sup> 6 T. R. 199.

<sup>2</sup> *Id.* 697.

<sup>3</sup> 2 Str. 878.

tered up; there being occasion to prove the debt in *Chancery*, and the writ of inquiry being lost, a rule was made for a new writ of inquiry and inquisition, according to the sheriff's notes, and that the master should indorse the costs, which by the commitment book appeared to have been taxed.

v 2 Str. 1077.

## CHAP. XXIII.

*Of Oyer of Deeds, &c. ; COPIES of written Instruments ; PARTICULARS of Demand ; and inspecting BOOKS, &c.*

**H**ITHERTO we have supposed the action to be rightly brought, and considered what is to be done, when the defendant has no merits. We have seen, that in such case, he should compromise or compound the action, confess it, or let judgment go by default. But when the case is different, he should prepare for his defence ; and for that purpose may, if circumstances render it necessary, crave oyer of deeds, &c. or copies of written instruments, call for particulars of the plaintiff's demand, or claim inspection of public books, court-rolls, &c. ; or he may move the court to change the venue, consolidate actions, unnecessarily divided, or strike out superfluous counts ; or he may bring money into court.

*Oyer* of deeds, &c. is demandable by the plaintiff, or by the defendant. If the plaintiff

in

in his declaration *necessarily* make a *profert in curia* of any deed, writing, letters of administration, or the like, the defendant may pray oyer, and must have a copy thereof delivered to him, if demanded; paying for the same after the rate of four-pence *per* sheet, and also for the stamps\*. So likewise if the defendant in his plea make a necessary *profert in curia* of any deed, &c. the plaintiff may pray oyer, and shall have a copy, at the like rate<sup>b</sup>: And the party, of whom oyer is demanded, is bound to carry the deed, &c. to the adverse party<sup>c</sup>. Formerly, all demands of oyer were made in court, where the deed is, by intendment of law, when it is pleaded with a *profert in curia*<sup>d</sup>: And therefore when oyer is craved, it is supposed to be of the court, and not of the party; and the words *ei legitur in hac verba*, &c. are the act of the court<sup>e</sup>. In practice, however, oyer is now usually demanded, and granted by the attornies<sup>f</sup>. And where the defendant is entitled to have oyer of a deed, it cannot be dispensed with by the

\* 2 Salk. 497. R. T. 5 &  
6 Geo. II. (b).

<sup>b</sup> *Id.* 6 Mod. 122.

<sup>c</sup> 2 T. R. 40.

<sup>d</sup> 12 Mod. 578. 3 Salk. 119.

<sup>e</sup> *Id.* 1 Sid. 108. but see

2 Lutw. 1644. *contra*.

<sup>f</sup> 6 Mod. 28.

court; nor can he be compelled to plead without it<sup>a</sup>, even though the deed be lost. But where the deed is in the hands of a third person, the court will oblige him to give oyer, and produce it<sup>b</sup>.

When a deed is shewn in court, it remains there, in contemplation of law, all the term in which it is shewn; for all the term is considered in law but as one day. And at the end of the term, if the deed be not denied, the law doth adjudge it to be in the custody of the party to whom it belongs; but if it be denied, then it shall remain in court till the plea is determined; and if it eventually turn out not to be a good deed, it shall be destroyed<sup>1</sup>. But letters testamentary, or of administration, are not supposed to remain in court all the term; for the party may have occasion to produce them elsewhere<sup>2</sup>. Hence it is, that oyer of a deed cannot in strictness be demanded, but during the same term it is pleaded<sup>3</sup>. And as a general imparlance is always to a subse-

<sup>a</sup> 2 Lil. P. R. tit. *Oyer*, 74. b. 2 Lutw. 1644.  
 266. 2 Keb. 274. 6 Mod. 28. <sup>b</sup> 2 Salk. 497. 12 Mod.  
 2 Str. 1186. 1 Will. 16. 598. S. C.  
 S. C. <sup>1</sup> 5 Co. 74. b. 2 Lutw.  
<sup>b</sup> 2 Str. 1198. 1644. 1 T. R. 149.  
<sup>1</sup> Co. Lit. 231. b. 5 Co.



quent term, it follows, that oyer of a deed cannot be demanded after such imparlance<sup>m</sup>. A different doctrine is indeed laid down in one case<sup>n</sup>, which must be understood of a *special* imparlance, to another day in the same term.

Though oyer is not in strictness demandable of a *record*<sup>o</sup>, yet if a judgment or other matter of record in the *same* court be pleaded, the party pleading it must give a note in writing, of the term and number-roll, whereon such judgment or matter of record is entered and filed; or in default thereof, the plea is not to be received<sup>p</sup>. And, probably on this account, the party was not anciently permitted to plead *nul tiel record*, of a judgment or matter of record in the *same* court<sup>q</sup>. But where a judgment or matter of record is pleaded in a *different* court, the party, not being entitled to an account of the term and number-roll, must plead *nul tiel record*. And

<sup>m</sup> 1 Keb. 32. 2 Lev. 142. see 1 Ld. Raym. 84.

Freem. 400. 3 Keb. 480. <sup>p</sup> Keilw. 96. Carth. 454.

491. S. C. 6 Mod. 28. but 1 Ld. Raym. 347. Carth.

see 2 Ld. Raym. 970. 517. 1 Ld. Raym. 550.

<sup>n</sup> 12 Mod. 99. and see 2 Str. 823. R. T. 5 & 6

2 Show. 310. Geo. II. (6).

<sup>o</sup> 1 Ld. Raym. 250, 347. <sup>q</sup> 5 Hen. VII. 24. per

(4th edit. note a.) Doug. Brian. 3 Keb. 76.

476, 7. 1 T. R. 149, 50, but

it seems, that oyer is not demandable of an act of parliament'.

Formerly, the defendant was allowed oyer of the original writ, in order to demur or plead in abatement, for any apparent insufficiency or variance'. But this indulgence having been abused, and made an instrument of delay, a rule was made, that a defendant be not allowed oyer of an original writ; and that if he demand it, the plaintiff may proceed, as if no demand had been made'.

The demand of oyer is a kind of plea'; and should regularly be made, before the time for pleading is expired'. If it be not made till after that time, the plaintiff may consider the demand as a nullity, and sign judgment. But though oyer be not in strictness demandable, yet if it be given, the party demanding has a right to make use of it'. If the defendant would insist upon his demand of oyer, he

' Doug. 476. Godb. 186.  
*contra*.

' Gilb. C. P. 52. 12 Mod.  
35, 189. 2 Lutw. 1644.  
6 Mod. 27. 2 Salk. 498.  
2 Ld. Raym. 970. R. T. 5 &  
6 Geo. II. b. 2 Wilf. 97.  
6 T. R. 363. Co. Ent. 320.

' R. T. 19 G. III. Doug.  
227, 8. 6 T. R. 363. Barnes,  
340. and see Bro. Abr. tit.  
Oyer, pl. 19.

" 3 Salk. 119.

' Fowler and Dyer, M.  
20 Geo. III.

" Doug. 476, 7.

should

should move the court to have it entered upon record<sup>a</sup>: If the plaintiff, on the other hand, would contest the oyer, he may either counterplead it, or strike out the rest of the pleading, and demur<sup>b</sup>; upon which the judgment of the court is, either that the defendant have oyer, or that he answer without it<sup>c</sup>: On the latter judgment, the defendant may bring a writ of error; for to deny oyer where it ought to be granted is error, but not *à converso*<sup>d</sup>.

There is no settled time prescribed for the plaintiff to give oyer; but the defendant shall in all cases have the same time to plead, after oyer given, as he had at the time of demanding it<sup>e</sup>. And he may either set forth the oyer in his plea or not, at his election<sup>f</sup>: If he set it forth, the court must adjudge upon it, as parcel of the record; though it was not strictly demandable, at the time of granting it<sup>g</sup>: But the defendant is not bound to set it forth in his plea<sup>h</sup>; and if he do not, the plaintiff may pray

<sup>a</sup> 6 Mod. 28.<sup>b</sup> 1 Str. 705. R. T. 5 & 6<sup>c</sup> 2 Lev. 142. 2 Salk. 497. Geo. II. (6).

and see 2 Ld. Raym. 970.

<sup>e</sup> 2 Str. 1241. 1 Wils. 97.<sup>d</sup> 2 Lev. 142.<sup>f</sup> 3 Salk. 119. Carth. 513.<sup>g</sup> 2 Salk. 497. 6 Mod. 28. 6 Mod. 27. Doug. 476.<sup>h</sup> 2 Ld. Raym. 970. S. C.<sup>i</sup> 2 Str. 1241. 1 Wils. 97.<sup>j</sup> Str. 1486. 1 Wils. 16. S. C. Barnes, 327. *contra*.

an inrolment, and so make it part of his replication.

The time allowed for the *defendant* to give oyer of a deed, &c. to the plaintiff, is *two* days exclusive after it is demanded<sup>f</sup>. And if it be not given in that time, the plaintiff may sign judgment, as for want of a plea<sup>g</sup>: If given, the plaintiff shall have the same time to reply, after oyer given him by the defendant, as he had at the time of demanding it<sup>h</sup>.

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If the action be founded on a written instrument not under seal, the defendant is not entitled to demand oyer: but the distinction formerly taken was, that where the plaintiff declared upon a writing, the court, on affidavit that he had no part, would let him have a copy; but where the declaration was on an agreement generally, and the writing but evidence, they would not grant it<sup>i</sup>. And accordingly, where an action was brought upon a special agreement contained in a note, and a rule made to shew cause, why the plaintiff should not give the de-

<sup>f</sup> Carth. 454. 2 T. R. 40.

<sup>g</sup> 6 Mod. 122.

<sup>h</sup> R. T. 5 & 6 Geo. II. (6).

<sup>i</sup> 2 Keb. 430. 1. Sid. 386.

defendant

defendant a copy; upon cause shewn, the rule was discharged, because the contract upon which the action was founded was a parol contract, of which the note was only evidence, and therefore the defendant ought not to have a copy<sup>\*</sup>. But at present, wherever the action is founded on a written instrument, as a policy of assurance<sup>1</sup>, bill of exchange, promissory note, special agreement, or undertaking in writing to pay the debt of a third person, &c. whether it be stated in the declaration to be in writing or not, a judge on summons, without an affidavit, will make an order for the delivery of a copy to the defendant or his attorney, and that all proceedings in the action be in the mean time stayed. And where the dispute was between the plaintiff a factor in *Smithfield*, and the defendant a grazier; the court, upon the defendant's motion, made a rule for the plaintiff to shew cause, why he

<sup>\*</sup> 1 Salk. 215.

<sup>1</sup> By the statute 19 Geo. II. c. 37. § 6. in actions upon policies of assurance, the plaintiff, his attorney or agent, shall within fifteen days after being required so to do in writing, by the de-

fendant, his attorney or agent, declare in writing, what sums he hath assured, or caused to be assured, in the whole, and what sums he hath borrowed at *respondentia*, or bottomree, for the voyage, or any part of it.

should



should not produce at the trial the several books wherein he entered the accounts of beasts sold, and of monies received, on the defendant's account: And no cause being shewn, the rule was made absolute<sup>n</sup>.

Where the defendant has the custody of a written instrument, which he holds as a trustee, the court in some instances will order him to give an inspection and copy of it, to the plaintiff, at his expence, and to produce it for various purposes: Thus, where the defendant was a stakeholder, the court ordered him to give the plaintiff, at his expence, a copy of the articles for *Epsom* races, and to produce the same at the trial<sup>n</sup>. So we have seen, that the plaintiff may have a rule *nisi* for the defendant to produce a deed, before the commissioners of the stamp-office, to be stamped; and also to give the plaintiff a copy of it, in order that he may declare thereon<sup>o</sup>. And where an action is brought by a sailor for his wages, on ship's articles, against the captain, in whose custody they are, it seems but reasonable, that the defendant, if required, should produce and give a copy of the articles. But in general, the court will not oblige a

<sup>n</sup> 2 Str. 1130.

<sup>o</sup> Barnes, 439.

<sup>p</sup> *Ante*, 405.

plaintiff

plaintiff to discover the evidence in support of his action, previous to the trial; and therefore they will not make a rule upon him to produce his books, &c.<sup>1</sup>: Nor can a rule be had for the inspection of books, &c. of a *private* nature, in the hands of third persons<sup>2</sup>.

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Where the declaration does not disclose the particulars of the plaintiff's demand, as in actions of *assumpsit*, or *debt* for goods sold, or for work and labour, &c. the defendant's attorney or agent may take out a summons before a judge, for the plaintiff's attorney or agent to shew cause, why he should not deliver to the defendant's attorney or agent the particulars in writing of the plaintiff's demand, for which the action is brought, and why all proceedings should not in the mean time be stayed<sup>3</sup>. This summons is usually taken out before plea; and unless good cause be shewn to the contrary, the judge will make an order, agreeably to the sum-

<sup>1</sup> 6 Mod. 264. but see Barnes, 236. Caf. temp.  
<sup>4</sup> Bur. 2489. Hardw. 130. 2 Blac. Rep.

<sup>2</sup> 1 Ld. Raym. 705. 2 Ld. 850.  
 Raym. 927. 1 Barnard. 466. <sup>3</sup> 3 Bur. 1390.

mons,

mons, which operates as a stay of proceedings till the particulars are delivered. Under such an order, the plaintiff or his attorney or agent should deliver a particular account in writing of the *items* of the demand, and when and in what manner it arose: And where there has been an account current, and payments have been made, for which the party means to give credit, it is said that the particular ought to contain as well those matters for which he means to give credit, as those for which the action is brought'.

So if an action be brought on a bond conditioned for the performance of covenants, or to indemnify, &c. the defendant may call for a particular of the breaches, for which the action is brought. And where a general form of declaring is given by act of parliament, as upon the statute 9 Ann. c. 14. or upon the 25 Geo. II. c. 36. it seems reasonable, that the plaintiff, if required, should give an account of the particulars of his demand, in order to enable the defendant to prepare for his defence. But wherever the particulars are disclosed in the declaration, as in *special-assumpsits*, *covenant*, or *debt* on ar-

\* 2 'Esp. Cas. Ni. Pri. 280.

ticles of agreement, &c. or in actions on matters of record, an order for such particulars does not seem to be requisite.

In actions for *wrongs*, the injury complained of is stated in the declaration; and therefore in such actions, it is not usual to make an order for the particulars; but circumstances may occur, which render it necessary. In an *ejectment*, brought on the forfeiture of a lease, the court will compel the plaintiff to deliver a particular of the breaches of covenant, on which he intends to rely<sup>1</sup>. So if the plaintiff declare generally in *ejectment*, and the defendant have any doubt what lands the plaintiff means to proceed for, he may call upon him by a judge's order, to specify them<sup>2</sup>: And on the other hand, the plaintiff may call on the defendant, to specify for what he defends, when that is not ascertained by the consent rule<sup>3</sup>.

As the defendant is allowed to call for the particulars of the plaintiff's demand, so when the defendant pleads or gives a notice of *set-off*, for goods sold, &c., the plaintiff may take out a summons for the particulars; upon which the judge will make an order for the defendant to

<sup>1</sup> 6 T. R. 597.

cases there cited.

<sup>2</sup> 7 T. R. 332. and the

deliver

deliver them in a certain time, or in default thereof, that he be precluded from giving evidence at the trial, in support of his set-off. If the particulars delivered under a judge's order be not sufficiently explicit, the party to whom they are delivered may take out a summons, and obtain an order for *further* particulars; and if, on the other hand, they are incorrect, or not sufficiently comprehensive, the party delivering them may have a summons and order to *amend* them.

At the trial, the particulars of the plaintiff's demand, or of the defendant's set-off, if delivered, are considered as incorporated with the declaration, plea, or notice; and on production of the order, and proof of their delivery, the parties are not allowed to give any evidence out of them: If the particulars of the defendant's set-off are not delivered, within the time mentioned in the judge's order, the defendant is precluded by the terms of it, from giving any evidence in support of his set-off. In an action of *assumpsit* brought by the assignees of a bankrupt, the defendant called for the particulars of the plaintiff's demand, which were given him, and then pleaded in abatement, that the promises were  
made



made by himself and another person jointly : issue being joined on this plea, it appeared in evidence at the trial, that the particulars chiefly related to transactions between the bankrupt and the defendant jointly with the person mentioned in the plea ; and though they were some *items* which concerned the defendant only, yet as these were not distinguished from the rest, the chief-justice would not suffer them to be given in evidence, and nonsuited the plaintiff : The court was afterwards moved, but refused to set aside the nonsuit \*.

We have already seen, that the parties are not entitled to the inspection of books, &c. of a *private* nature \*. But it is a general rule, that a party has a right to inspect and take copies of such books, &c. as are of a *public* nature, wherein he has an interest ; so as they be material to the suit, and the party in possession be not obliged to furnish evidence against himself, in a criminal prosecution \*. And if they are not evidence of themselves, the court will order them to be produced at the trial † ; otherwise a copy is suffi-

\* *Colson* and others, assignees, &c. v. *Selby*, E. 36 G. III.

† *Ante*, 507.

\* 1 Blac. Rep. 44.

† 1 Str. 126. 12 Vin. Abr. 104. pl. 68. S. C. Barnes, 468. 2 T. R. 234.

cient :

cient: And they will never make a rule to produce the original, unless it be necessary to inspect it, on account of an erasure or new entry<sup>a</sup>.

The books of the *Sessions* are considered as public books, which every one has a right to inspect<sup>a</sup>. And every man has a right to inspect the proceedings, to which he himself is a party<sup>b</sup>; for he has an interest in such proceedings. But upon an indictment for felony, it is not usual to grant a copy of the record of acquittal, where there is any the least probable cause for the prosecution<sup>c</sup>.

*Parish*-books, and the books of the *Custom-house*, *Post-office*, *Bank*, *South-Sea house*, *India company*, &c. are to some purposes considered as public books; and persons who have an interest therein, have a right to inspect them<sup>d</sup>. So the books of the commissioners of the *lottery*,

<sup>a</sup> 1 Str. 307. Say. Rep. 76. 240. 1 Blac. Rep. 41. S. C.

<sup>a</sup> 1 Wils. 297. *Rex v. Berk- ing*, cited in 1 Wils. 240. cited. Say. Rep. 250.  
1 Blac. Rep. 39. S. C. <sup>c</sup> 1 Ld. Raym. 253. Carth. 421. S. C. 3 Blac. Com. 126.

<sup>b</sup> 1 Str. 126. 12 Vin. Abr. But see 2 Str. 1122. 1 Blac. Rep. 385. Leach's Cr. Law. 25.  
104. pl. 68. S. C. Caf. 25.

<sup>d</sup> 2 Ld. Raym. 851. 7  
1242. Barnes, 236, 468. Mod. 129, S. C. 1 Str. 304.  
But see 1 Ld. Raym. 252. 1 Barnard. 455. 2 Str. 954.  
Carth. 421. S. C. Gilb. Barnes, 236.  
Caf. B. R. 134. (Dr. *West's* Cafe) 2 Str. 1005. 1 Wils.

and their numerical lists are of a public nature; and are kept by the commissioners in trust for the ticket holders, who are entitled to an inspection of them, by rule of court<sup>e</sup>. But access is not allowed to parish-books<sup>f</sup>, &c. for the trial of questions of a *private* nature, or in *collateral* actions, brought by or against persons who have no interest therein. And though the *East-India* Company are compellable to produce their public books<sup>g</sup>, yet they are not obliged to produce their books of letters<sup>h</sup>, &c. nor their private books, relating to the appointment of their servants<sup>i</sup>.

The *Court-rolls* and books of a manor are of a public nature, the tenants have an interest therein, and the lord who has the custody of them, is considered merely as a trustee<sup>k</sup>. Hence it is of course, to grant leave to inspect the court-

<sup>e</sup> *Schinotti v. Bumstead* and others, H. 36 G. III. 1 Willf. 240. Say. Rep. 250.

<sup>f</sup> As to *parish-books*, see 1 Blac. Rep. 40. S. C. but see Barnes, 235. Com. Rep. 555. S. C.

5 Mod. 335. 1 Ld. Raym. 337. S. C. 12 Vin. Abr. 7 Mod. 129. 2 Ld.

147. pl. 11. 1 Barnard. 100. Raym. 851. S. C.

1 Willf. 240. but see 1 Blac. 1 Str. 646.

Rep. 27. And as to *custom-* 2 Str. 717.

house books, &c. see 1 Ld. 2 Id. 955, 1005.

Raym. 705. 2 Str. 1005.

rolls, &c. of a manor, on the application of a tenant of the manor, who has been refused that permission by the lord<sup>1</sup>. But this privilege is confined to the tenants of the manor: for the lord or tenants of a different manor, having no interest in the court-rolls, &c. cannot claim the inspection of them<sup>m</sup>. And in one case, a *freeholder* was refused a rule to inspect the rolls of the manor, in a case between himself and the lord, touching a *copyhold*<sup>n</sup>.

So the books of a *Corporation* are in nature of public books<sup>o</sup>; and every member of the corporation, having an interest therein, has a right to inspect and take copies of them, for any matter that concerns himself, though it be in a dispute with others<sup>p</sup>. And in actions brought by corporations for toll, against defendants, who were not members of the corporation, the court have, in several recent instances, on the application of the defendants, granted a rule for inspection of such parts of the deeds, &c. as re-

<sup>1</sup> 3 T. R. 141. and see Barnes, 237. 2 Blac. Rep. Barnes, 236. 2 Blac. Rep. 1030. *semb. contra*; see also 1061. *accord*. 2 Vez. 620.

<sup>m</sup> 12 Vin. Abr. 146. Bunb. 269. 2 Str. 1005. 3 T. R. 142.

<sup>p</sup> 1 Will. 104. but see

2 Blac. Rep. 1030. *semb. contra*; see also 2 Vez. 620. 2 Str. 954. 5. *Id.* 1223. Barnes, 235. Com. Rep. 555. S. C.

lated to the matter in dispute<sup>1</sup>; which rule has been directed to the town-clerk, requiring him to give the inspection upon oath: for the defendant, in such case, has an interest in the deeds, &c. though distinct from that of the corporation; and the foundation of the rule is, that as the court of chancery would order inspection, merely for asking<sup>2</sup>, this court will do the same thing, to save expence to the parties<sup>3</sup>. But in this, as in most of the other cases, the inspection is confined to the subject-matter in dispute<sup>4</sup>: And these rules of inspection, in cases of copyholds, corporations, &c. are never granted, but only where *civil* rights are depending<sup>5</sup>; for it is a constant and invariable rule, that in *criminal* cases, the party shall never be obliged to furnish evidence against himself<sup>6</sup>.

<sup>1</sup> 1 T. R. 689. 3 T. R. 1005, 1223. 1 Willf. 239.  
<sup>2</sup> 303. 1 H. Blac. 211. but see 1 Blac. Rep. 40. S. C. 3 T.  
<sup>3</sup> 5 Mod. 395. 1 Ld. Raym. R. 303. but see 3 T. R.  
<sup>4</sup> 337. S. C. 2 Str. 1203. 579.  
<sup>5</sup> Barnes, 238. 3 Willf. 398. <sup>6</sup> 1 Willf. 240.  
<sup>7</sup> 2 Blac. Rep. 877. S. C. <sup>8</sup> 1 Ld. Raym. 705. 2 Ld.  
*amb. contra.* Raym. 927. 2 Str. 1210.  
<sup>9</sup> 2 Vez. 620. 1 Willf. 239. 1 Blac. Rep.  
<sup>10</sup> 1 T. R. 689. 3 T. R. 37. S. C. *Id.* 351. S. P.  
<sup>11</sup> 303. 4 Bur. 2489. 1 T. R. 689.  
<sup>12</sup> 1 Barnard. 455. 2 Str. 3 T. R. 145.



The motion for leave to inspect books, &c. is founded on an affidavit, stating the circumstances under which the inspection is claimed, and that it has been demanded and refused<sup>w</sup>. If a rule be made to shew cause why an information should not be filed, in nature of a *quo warranto*, the court will make a rule for the prosecutor to inspect and take copies of books and records, as soon as the rule to shew cause is granted<sup>x</sup>: but if a rule be made to shew cause why a *mandamus* should not be awarded, the court will not make a rule for the prosecutor to inspect and take copies of books and records, until the rule is made absolute, and a return is made to the *mandamus*<sup>y</sup>. And in an action against a corporation, upon a right of toll, the court refused a rule to inspect the public books, records, and writings of the corporation; because no issue was joined, so that it could not appear whether such inspection would be necessary<sup>z</sup>.

<sup>w</sup> Barnes, 236. 3 Willf. R. 581.  
<sup>x</sup> 399. Where no action is depending, the motion is for a *mandamus*; as to which, see Mr. Nolan's edition of *Strange*, p. 1223. *in notis*.  
<sup>y</sup> Say. Rep. 145. 1 Ld. Raym. 253. *accord*.  
<sup>z</sup> 2 Blac. Rep. 877. 3 Willf. 398. S. C. 1 Ld. Raym. 253. Carth. 421. S. C. *accord*.  
<sup>x</sup> Cal. temp. Hardw. 245. Say. Rep. 145. but see 3 T.

## CHAP. XXIV.

Of CHANGING *the* VENUE, CONSOLIDATING ACTIONS, and STRIKING OUT COUNTS.

THE law having settled the distinction between *local* and *transitory* actions, it seems that towards the reign of *Rich. II.* it was greatly abused<sup>a</sup>; for a litigious plaintiff would frequently lay his action in a foreign county, at a great distance from where the cause of it arose, and by that means oblige the defendant to come with his witnesses into that county. To remedy which, it was ordained by statute<sup>b</sup>, “to the intent that writs of debt and accompt, and all other such actions, be from henceforth taken in their counties, and directed to the sheriffs of the counties where the contracts of the same action did arise; that if from henceforth, in pleas upon the same writs, it shall be declared, that the contract thereof was made in another

<sup>a</sup> Gilb. C. P. 89.<sup>b</sup> 6 R. H. c. 2.

“ county, than is contained in the original writ,  
 “ that then the same writ shall be utterly  
 “ abated.” The design of this statute was to  
 compel the suing out of all writs arising upon  
 contract, in the very county where the contract  
 was made<sup>c</sup>, agreeably to the law of *Henry the*  
*First*<sup>d</sup>, *Unusquisque per pares suos judicandus est,*  
*et ejusdem provinciae; peregrina vero judicia modis*  
*omnibus submovemus*<sup>e</sup>. But as the statute only  
 prescribes, that the count shall agree with the  
 writ, in the place where the contract was made,  
 it did not effectually prevent the mischief<sup>f</sup>: And  
 therefore a statute of *Henry the Fourth*<sup>g</sup> directs  
 all attornies to be sworn, that they will make no  
 suit in a foreign county; and there is an old rule  
 of court<sup>h</sup>, which makes it highly penal for attor-  
 nies to transgress this statute.

Soon after the statute of *Henry the Fourth*, a  
 practice began of pleading in abatement of the  
 writ, the impropriety of its venue, even before  
 the plaintiff had declared<sup>i</sup>. At first, in the reign  
 of *Henry the Fifth*, they examined the plaintiff  
 upon oath, as to the truth of his venue; But

<sup>c</sup> 2 Blac. Rep. 1032.

<sup>d</sup> *Leg. Hen. 1. c. 31.*

<sup>e</sup> *Gilb. C. P. 89. in notis.*

<sup>f</sup> 2 Blac. Rep. 1032.

<sup>g</sup> 4 Hen. IV. c. 18.

<sup>h</sup> R. M. 1654. 45.

<sup>i</sup> 2 Blac. Rep. 1033.

soon after, they began to allow the defendant to traverse the venue, and to try the traverse by the country<sup>k</sup>. This practice being subject to much delay, the judges introduced the present method of changing the venue upon motion, on the equity of the above statutes; which Lord *Holt* says<sup>l</sup>, began in the time of *James* the First: And accordingly we find, that among the fees of this court, as found by a jury, under the king's commission in 1630, one is, "for every rule to alter a *visne*." The form of the rule and affidavit are also stated by *Styles*<sup>m</sup>, as established in 23 *Car.* I.

But whenever the practice began, it is now settled, that in *transitory* actions, the venue may be changed upon motion, either by the plaintiff or defendant. The plaintiff shall not *directly* alter his venue after the *essoign-day* of the next term after appearance; though he would pay costs, or give an *imparlance*<sup>n</sup>. Yet he may in effect do it, by moving to amend<sup>p</sup>; and that, after the defendant has changed the venue<sup>q</sup>, or

<sup>k</sup> *Rastal*, tit. *Debt*, 184. (b).

*Fitz. Abr.* tit. *Brief*, 18.

<sup>l</sup> 2 *Salk.* 670.

<sup>m</sup> *Trye's jus fil.* 231.

<sup>n</sup> *Sty. P. R.* (ed. 1707.) 631.

<sup>o</sup> *Sty. P. R.* 625. *R. M.*

10 *Geo. II. reg.* 2. (c).

<sup>p</sup> 2 *Str.* 1162.

<sup>q</sup> *Id.* 1202.

pleaded<sup>1</sup>, and even after two terms have elapsed from the delivery of the declaration<sup>2</sup>.

The defendant is, in general, allowed to change the venue in all *transitory* actions, arising in a county different from that where the plaintiff has laid it<sup>3</sup>; and he may even change it from *London* to *Middlesex*<sup>4</sup>, or *vice versa*<sup>5</sup>. But the venue cannot be changed in *local* actions<sup>6</sup>. And in *transitory* actions, where material evidence arises in two counties, the venue may be laid in either<sup>7</sup>: And if it be laid in a third county, the court will not change it; for the defendant in such case cannot make the necessary affidavit, that the cause of action arose in a particular county, and not elsewhere. Thus, where the venue was laid in *London*, and it appeared, from the affidavit, that the cause of action arose upon a bridge called *King's-bridge*, partly in the county of *Kent*, and partly in the county of the city of *Canterbury*, and not elsewhere, the court refused to change the venue<sup>8</sup>.

<sup>1</sup> 1 Wilf. 173.

<sup>2</sup> Say. Rep. 150, 294.

<sup>3</sup> R. M. 1654. § 5.

<sup>4</sup> 2 Str. 857.

<sup>5</sup> 2 T. R. 275.

<sup>6</sup> Say. Rep. 146.

<sup>7</sup> 2 Salk. 669. R. M. 10 Geo. II. reg. 2. (c). 2 T. R. 275. 7 T. R. 583.

<sup>8</sup> 1 Wilf. 178.

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Where the cause of action arises out of the realm, the court will not change the venue; because the action may as well be tried in the county where the venue is laid, as in any other, where the cause of action did not arise<sup>a</sup>. And in other cases, we have just seen, that in order to change the venue, it is indispensably necessary that the cause of action should be *wholly* confined to a single county. Therefore in an action of debt on bond, or other specialty<sup>a</sup>, the court will not change the venue, unless some special ground be laid<sup>b</sup>; for *debitum et contractus sunt nullius loci*, and bonds and other specialties are *bona notabilia*, wherever they happen to be<sup>c</sup>. In analogy to which it is now holden<sup>d</sup>, agreeably to the practice of the court of common pleas<sup>e</sup>, that the venue cannot be changed in an action upon a promissory note or bill of exchange. But the venue may still be

<sup>a</sup> Say. Rep. 77. Cowp. 176.

<sup>a</sup> 1 Keb. 65. 1 Sid. 87. Sty. P. R. 631. 2 Str. 878. Andr. 66. R. M. 10 Geo. II. (c). Gilb. K. B. 339. Gilb. C. P. 90. *Balein v. Kent*, E. 20 Geo. III. Barnes, 491.

<sup>b</sup> *Pole v. Horobin*, M. 22 Geo. III. 1 T. R. 781.

<sup>c</sup> 1 T. R. 571.

<sup>d</sup> Andr. 66. *per Chapple* Just. R. M. 10 Geo. II. (c).

*Precious v. Bennet*, E. 25 Geo. III. 1 T. R. 571. but see the opinion of the other justices in Andr. 66. 1 Will. 41. Say. Rep. 7. *contra*.

<sup>e</sup> Barnes, 480, 483, 485, 487, 491, 2. 2 Blac. Rep. 1036.

changed

changed in an action upon a policy of insurance<sup>f</sup>, not being by deed; or in any other action, the right of which is founded upon simple contract<sup>g</sup>.

In an action for *scandalum magnatum*, the court will never change the venue<sup>h</sup>; because a scandal raised of a peer of the realm is not confined to any particular county, but reflects on him through the whole kingdom: and he is a person of so great notoriety, that there is no necessity for obliging him to try his cause in the neighbourhood. So in an action for a libel, published in a newspaper in one county, and circulated in other counties<sup>i</sup>, or contained in a letter, written by the defendant in one county, and directed into another<sup>k</sup>, the court will not change the venue; because the defendant cannot make the common affidavit, that the cause of action arose in a single county, and not elsewhere: And for a similar reason, the venue cannot be changed in an action against a carrier or lighterman<sup>l</sup>, or for an escape<sup>m</sup>, or false return<sup>n</sup>. So in an action for infringing

<sup>f</sup> Andr. 66. 2 Str. 1180.

Say. Rep. 7. 2 T. R. 275.

7 T. R. 205.

<sup>g</sup> Say. Rep. 7.

<sup>h</sup> 1 Lev. 56. 2 Salk. 668.

Carth. 400. S. C. 2 Str. 807.

Barnes, 482. Gilb. C. P. 90.

<sup>i</sup> 1 T. R. 571.

<sup>k</sup> *Id.* 647.

<sup>l</sup> 2 Salk. 670.

<sup>m</sup> *Id.* 1 Keb. 65. 1 Sid. 87.

<sup>n</sup> 2 Salk. 669. 2 Str. 727.

Say. Rep. 54. 1 Wils. 336.

S. C.

a patent,

a patent, the plaintiff cannot change the venue from *Middlesex* to any other county\*. But in an action for a libel, the court will change the venue into a county, in which it was both written and published<sup>1</sup>: And the distinction seems to be, between a libel which is dispersed through several counties, and a letter which is written in one county, and not opened in another; on the former, the venue cannot be changed, on the latter it may<sup>2</sup>.

Though the court in general will not change the venue, where it is laid in the proper county, yet they will change it, even then, upon a special ground: Thus in debt on bond, where the venue was laid in *London*, and the plaintiff's and defendant's witnesses lived in *Lincolnshire*, the court changed it into the latter county<sup>3</sup>. And where a fair and impartial trial cannot be had in the county where the venue is laid, the court, on an affidavit of the circumstances, will change it, in *transitory* actions<sup>4</sup>; or in *local* actions, will give leave to enter a suggestion on the roll, with a *nient de-*

\* 6 T. R. 363.

1 Will. 162. 1 T. R. 782.

2 3 T. R. 306. *Ariss v. Tey-*  
*lor*, T. 35 Geo. III. *in notis.*

3 2 Str. 874. 3 Bur. 1564.

4 3 T. R. 652.

1 Blac. Rep. 480. S. C. but

5 1 T. R. 781. but see 1 Barnard. 253.

*dire,*

*dire*, in order to have the trial in an adjoining county<sup>t</sup>. So the parties by consent may change the venue in local actions<sup>u</sup>, or have them tried out of their proper county, such consent being entered by suggestion on the roll<sup>v</sup>.

On the other hand, though the court will in general change the venue, where it is not laid in the proper county, yet if an impartial or satisfactory trial cannot be had there, they will not change it; as in an action for words spoken of a justice of the peace, by a candidate upon the hustings, at a county election<sup>w</sup>. And in order to avoid delay, the court will not change the venue, except by consent, into a *northern* county, or into the city of *Bristol* or *Norwich*, where there are no Lent assizes, in *Michaelmas* or *Hilary Term*<sup>x</sup>; nor into *Hull*, *Canterbury*, &c. where the justices of *nisi prius* seldom come<sup>y</sup>; nor into the city of *Worcester* or *Gloucester*, out of the county at large, because the assizes for the city and county

<sup>t</sup> 10 Mod. 198. 1 Str. 235. 2 Salk. 670. 4 Bar. 2447.

3 Bur. 1334. 1 T. R. 363. <sup>x</sup> 2 Str. 1180, 1216.

<sup>u</sup> 1 Wils. 298. *Groves v. Durall*, H. 38 Geo. III. 1 Wils. 138. *per Cur. M.* 37 G. III. and see 3 Blac. Com.

<sup>v</sup> *Fonnereau v. Fonnereau*, 294.

*per Cur.*

<sup>y</sup> R. M. 1654. 55. Barnes,

<sup>w</sup> Cowp. 510. and see 490.

at large are holden at the same place. But the venue may be changed, as a matter of course, into a *northern* county, or into the city of *Bristol*<sup>z</sup>, &c. previous to the summer assizes.

So, where the venue is not laid in the proper county, the *privilege* of the plaintiff will in some cases prevent the court from changing it. Thus in an action brought by a barrister<sup>a</sup>, attorney<sup>b</sup>, or other officer of the court<sup>c</sup>, if the venue be laid in *Middlesex*, the plaintiff, suing as a privileged person, has a right to retain it there, on account of the supposed necessity of his attendance on the court: But if the venue be laid in any other county, as in *London*<sup>d</sup>; or the plaintiff, though privileged, sue as a common person, by original or otherwise<sup>e</sup>, or *en auter droit*, as executor or administrator, or jointly with his wife or other persons<sup>f</sup>, he has no such privilege. And where a barrister, attorney, or other officer of the

<sup>a</sup> *Stanley v. Preston*, T. 153, 180. Barnes, 479.  
24 Geo. III. *Tucker v. Morgan*, E. 35 Geo. III. Ante, 260, 267, 8.

<sup>c</sup> 2 Salk. 670. 2 Ld. Raym. 1253.  
<sup>d</sup> 2 Salk. 668.  
<sup>e</sup> Pr. Reg. 419, 420.  
2 Str. 822. 1 Wils. 159. Barnes, 479, 484.

<sup>f</sup> R. M. 10 Geo. II. reg.

<sup>b</sup> 2 Salk. 668. Say. Rep. 2. (c).

court,



court, is *defendant*, he has no privilege whatever, respecting the venue<sup>a</sup>.

Where the cause of action arises in *Wales*, and the venue is laid elsewhere, it cannot be changed, without consent, into the next adjoining English county<sup>b</sup>; because the defendant cannot make the common affidavit, which is never dispensed with, that the cause of action arose in that particular county, and not elsewhere<sup>c</sup>. And it has been doubted, whether the venue can be changed, otherwise than by consent, directly into *Wales*<sup>d</sup>; inasmuch as no trial can be had there, but the issues (if any) must be tried in the next adjoining English county: And if the defendant let judgment go by default, it is doubtful whether the court can award a writ of inquiry. The venue, however, has been frequently changed into the counties-*palatine*; because the court can send

<sup>a</sup> Carth. 126. Show. 148. next English county. *Powell*  
4 Bur. 2027. 3 T. R. 573. v. *Wilkins*, H. 37 Geo. III.  
Barnes, 482. Pr. Reg. 419. <sup>1</sup> 4 Bur. 2452.  
but see 2 Salk. 668. 1 Str. <sup>2</sup> 2 Str. 1270. 1 Willf. 222.  
610. 2 Str. 1049. *contra*. Say. Rep. 48. 4 Bur. 2450.  
<sup>b</sup> 2 Str. 1258. 1 Willf. 138. 2 Blac. Rep. 962. Doug.  
S. C. It is always changed 262, 3. and see the stat.  
into the Welch county, and 13 Geo. III. c. 51. § 1, 2.  
never immediately into the

down the record there by *mittimus*<sup>1</sup>: And, in one instance, it was changed into the next adjoining county<sup>m</sup>. But where the venue is changed into a county-palatine, the court will require an undertaking from the defendant, not to assign error for want of an original<sup>n</sup>. Where the cause of action arises in *Berwick*, and the venue is laid elsewhere, it is not settled, whether it can be changed into *Northumberland*, as being the next adjoining county<sup>o</sup>: But it seems that the court, upon a proper suggestion, will order the cause to be tried there<sup>p</sup>.

The motion for the defendant to change the venue is a motion of course; and must formerly have been made within eight days after the declaration delivered<sup>q</sup>, which was the time allowed, by the rules of the court, for pleading<sup>r</sup>: And accordingly it is said<sup>s</sup>, that if a declaration be delivered so early in term, that the defendant has eight days in that term, he cannot move to change the venue the next term. But it is now

<sup>1</sup> 2 Ld. Raym. 1418.

<sup>m</sup> Wilf. 222. but see 2 Str. 807. Pr. Reg. 428, 9. Barnes, 478, 481, 488. *contra*.

<sup>n</sup> 12 Mod. 313.

<sup>n</sup> 1 Sel. 272.

<sup>o</sup> 2 Blac. Rep. 1036.

<sup>p</sup> 2 Bur. 859.

<sup>q</sup> 2 Salk. 688.

<sup>r</sup> *Id.* 2 Str. 1192.

<sup>s</sup> 1 Str. 211.

settled,

settled, that the defendant may move to change the venue, at any time before plea pleaded<sup>1</sup>; and he is even allowed to change it, after an order for time to plead, though upon the terms of pleading issuable; but not after an order for time to plead<sup>2</sup>, where the terms are to plead issuable, and take short notice of trial, at the first or other sittings within term, in *London* or *Middlesex*; because a trial would by that means be lost<sup>3</sup>. And the venue cannot be changed, at the instance of the defendant, after plea pleaded; even though he afterwards have leave to withdraw his plea, and plead it *de novo*, with a notice of set-off<sup>4</sup>.

In order to change the venue, the defendant must make a positive affidavit, *that the plaintiff's cause of action (if any) arose in the county of A. and not in the county of B.* (where the venue is laid), *or elsewhere out of the county of A.*<sup>5</sup> An affidavit was necessary, because the motion to change the venue succeeded and was equivalent to a plea in abatement<sup>6</sup>; and the form of the

<sup>1</sup> R. M. 1654. § 5. Gilb. 26 Geo. III.  
K. B. 339.

<sup>2</sup> Say. Rep. 207.

<sup>3</sup> Cowp. 511. Barnes, 493.  
S. P. but see 1 Will. 245.

*contra.*

<sup>4</sup> *Palmer and Turner*, H.

<sup>5</sup> Sty. P. R. 631. R. M.  
10 Geo. II. reg. 2. (c). 3 T.  
R. 495. and see Append.  
Chap. XXIV.

<sup>6</sup> 2 Blac. Rep. 1033.

affidavit,

affidavit, which was settled so long ago as the reign of King *Charles* the Second<sup>a</sup>, has been ever most religiously adhered to<sup>a</sup>.

Where the court see that the venue has been improperly changed, they will discharge the rule for changing it, and by that means bring the venue back to the county where it was originally laid: As if the venue be changed from A. to B. on the usual affidavit, that the cause of action arose wholly in B. when in fact part of the cause of action arose in another county, the court will order the venue to be brought back to A.<sup>b</sup> And in general, as it would be hard to conclude the plaintiff, by the single affidavit of the defendant, he is at liberty to aver, that the cause of action arose in the county where the venue is laid, and to go to trial thereon, at the same time that the merits are tried; by undertaking to give material evidence, arising in that county<sup>c</sup>: And upon such undertaking, the court will discharge the rule for changing the venue<sup>d</sup>. This practice is equivalent to joining issue, that the cause of action arose in the first county: and if the plaintiff fail in proving it, he must be nonsuited at the trial;

<sup>a</sup> 1 Sid. 185, 442.

<sup>b</sup> 7 T. R. 205.

<sup>c</sup> Say. Rep. 77. 4 Bur.

<sup>c</sup> 2 Blac. Rep. 1033.

2452. 3 T. R. 494.

<sup>d</sup> 2 Salk. 669.

M m

which

which has in this case the same effect, as quashing the writ by a judgment on a plea in abatement, viz. *quod defendens eat sine die*, and the plaintiff must begin again\*. Originally it was required, that the plaintiff should give *no* evidence at the trial, but what arose in the county wherein the venue was retained<sup>f</sup>: And if he gave no such evidence, he must have been nonsuited of course. But when it was laid down (more liberally) in *Swaine's case*\*, that the plaintiff might lay his venue in any county, wherein part of the cause of action arose, he was then bound only to give *some* evidence, and not the whole, (*dare aliquam evidentiā*,) in the county where the venue was laid<sup>h</sup>; which continues to be the rule at this day. The evidence, however, must be material; and therefore it is not sufficient merely to prove, that the witnesses to the contract reside in the county where the venue is laid<sup>i</sup>. But where a rule to change the venue from *Middlesex* to *London* was discharged, on the plaintiff's undertaking to give material evidence in *Middlesex*, the court held, that the undertaking was complied

\* Gilb. C. P. c. 7.

<sup>h</sup> 2 Salk. 669. 12 Mod.

<sup>f</sup> 1 Keb. 859. 1 Sid. 442. 515.

<sup>g</sup> 1 Sid. 405.

<sup>i</sup> 2 Blac. Rep. 1031.

with,



with, by proving a rule of court, obtained by the defendant in *Middlesex*, for paying money into court<sup>k</sup>; although that rule was obtained, after the rule for changing the venue was discharged.

It was formerly holden, that the plaintiff must move to discharge the rule for changing the venue, before replication<sup>l</sup>; and therefore that he came too late after issue was joined, and delivered to the defendant's agent<sup>m</sup>. But now, as the plaintiff may alter his venue, by moving to amend<sup>n</sup>, so, for avoiding circuity, he may move to discharge the rule for changing the venue, on undertaking to give material evidence in the county where it is laid, at any time before the cause is tried: And it was accordingly discharged in one case, after the cause had been twice taken down for trial<sup>o</sup>.

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If two actions are depending at one time, by the same plaintiff, against the same defendant, for causes which may be joined, and particularly if the defendant is holden to bail in both, the

<sup>k</sup> 2 T. R. 275.

others, M. 20 Geo. III. K. B.

<sup>l</sup> 2 Str. 858.

<sup>n</sup> *Ante*, 519.

<sup>m</sup> — v. *Boddington* and

<sup>o</sup> Cowp. 409.

court will compel the plaintiff to consolidate the actions; and on account of the vexation, to pay the costs of the application<sup>1</sup>. But where three actions were successively brought by the same plaintiff against the same defendant, upon three notes of hand, which became due at different times, the court refused to consolidate them<sup>2</sup>. And the court will not consolidate actions against different defendants: Thus, where it was moved that four several declarations in trespass, against four different defendants, might be put into one, on an affidavit that the trespass, if any, was committed by all jointly; the court said, they never went so far as the case of different defendants, but only where the declarations are between the same parties: The plaintiff may have the benefit of the others' evidence, in his action against either; but this would be to deprive him of that benefit<sup>3</sup>.

In actions upon a policy of assurance against several underwriters, the court, by consent of the plaintiff, will make a rule, on the application of the defendants, which is called the *Consolidation-rule*, for staying the proceedings in all the actions

<sup>1</sup> 2 T.R. 639. but see 2 Str. M. 25 Geo. III.  
<sup>2</sup> 1149, 1178. *semb. contra.*      • 1 Str. 420. and see Cal.  
<sup>3</sup> *Mussenden and O'Hara, temp. Hardw.* 137.

except one, upon the defendants' undertaking, to be bound by the verdict in that action, and to pay the amount of their several subscriptions and costs, in case a verdict shall be given therein for the plaintiff. This rule, though attempted before without success<sup>1</sup>, was introduced by Lord *Mansfield* into general use, to avoid the expence and delay arising from the trial of a multiplicity of actions upon the same question<sup>2</sup>; and if the plaintiff will not give his consent, the court have the power of granting imparlances in all the actions but one, till the plaintiff has an opportunity of proceeding to trial in that action<sup>3</sup>. On the other hand, if the plaintiff consent to the rule, the court will make the defendants submit to reasonable terms, such as admitting the policy, producing and giving copies of books and papers, and undertaking not to file a bill in equity, or bring a writ of error<sup>4</sup>.

But though the defendants undertake to be bound by a verdict in one action, yet this must be understood to mean such a verdict as the court think ought to stand, as a final determination of the matter; and therefore where the defendant,

<sup>1</sup> 2 Barnard. K. B. 103.

<sup>2</sup> Parke's Insur. *Introd.*

<sup>3</sup> Parke's Insur. *Introd.*

<sup>4</sup> *Id. ibid.*

after a verdict for the plaintiff in one action, obtained a new trial, the court would not make a rule, previous to the new trial, for the other defendants to pay the money to the plaintiff, pursuant to their undertaking<sup>\*</sup>. The defendants in several actions on a policy of insurance, paid money into court, which the plaintiff took out, without taxing the costs at that time; afterwards they entered into the common consolidation rule; and the plaintiff being nonsuited in the action that was tried, the court held that the latter was not entitled to the costs in any of the actions, up to the time of paying money into court<sup>†</sup>. In actions upon a policy of assurance, against several underwriters, where the parties had not entered into the consolidation rule, the attorney for the plaintiff made out a full brief in one cause, but only a short statement in the rest; and the master, on taxation, having allowed for full briefs in all the causes, the court made a rule for him to review his taxation<sup>‡</sup>.

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As the court, for the sake of avoiding expence, will consolidate unnecessary actions, so when it

<sup>\*</sup> 3 Bur. 1477.

<sup>†</sup> 7 T. R. 372.

<sup>‡</sup> *Martineau v. Barnes* and others, H. 23 Geo. III.

appears,

appears, on the face of the declaration, that some of the counts are superfluous, the court will order them to be expunged; and if there be any vexation, will make the plaintiff pay the costs of the application. Thus, where several counts in a declaration are precisely the same, or, which more frequently happens, there is only a formal difference between them, and the same evidence will support each<sup>a</sup>, as if the plaintiff declare specially and generally, for a matter that may be given in evidence upon a general count, the court will expunge the superfluous counts: And it seems reasonable that they should expunge such counts as appear, by reference to the bill of particulars, to be altogether inapplicable to the plaintiff's case<sup>b</sup>. But where there is a material difference between the counts<sup>c</sup>, the court will not determine, upon affidavits, whether they are well founded in point of fact;

<sup>a</sup> *Caf. temp. Hardw.* 129.

<sup>b</sup> This point came before the court, in the case of *Arbouin v. Wyatt*, M. 38 G. III. but was not determined; the rule being discharged, for want of an affidavit to identify the bill of particulars.

<sup>c</sup> In the case of *Cowan v. Berry*, E. 38 G. III. the declaration which was in debt

for penalties on the statute 9 Ann. c. 14. consisted of 480 counts, for money won at play, of different persons, at different times; and the court granted a rule *nisi*, for limiting the declaration to ten counts; but on shewing cause, the rule was discharged with costs.



for if not, the plaintiff will be sufficiently punished by paying the costs, which he will be subject to, on such of the counts as are found for the defendant.

If a declaration be unnecessarily long, the court will order the superfluous matter to be expunged; as where, in an action of covenant upon an indenture, the plaintiff recites the whole of it, and not merely such parts as are necessary<sup>d</sup>; or where, in an action of trover, he sets out a long inventory of goods, with frequent and unnecessary repetitions and descriptions. In these cases, when the objection is clear, the court will order the superfluous counts or matter to be expunged, on motion, in the first instance; but otherwise they will refer it to the master, and decide upon his report.

<sup>d</sup> Cowp. 665, 727.

## CHAP. XXV.

*Of BRINGING MONEY into COURT.*

THE practice of bringing money into court was first introduced in the reign of *Car. II.* at the time when *Kelyng* was chief-justice, to avoid the hazard and difficulty of pleading a tender<sup>a</sup>. And it is allowed in cases where an action is brought upon contract, for the recovery of a debt<sup>b</sup>, which is either certain, or capable of being ascertained by mere computation, without leaving any sort of discretion to be exercised by the jury<sup>c</sup>. In these cases, when the dispute is not whether any thing, but how much is due to the plaintiff, the defendant may have leave to bring into court any sum of money he thinks fit; and the court will make a rule, that unless the plaintiff accept of it, with costs, in discharge of the action, it shall be struck out of the declaration,

<sup>a</sup> 1 *Ld. Raym.* 255. 2 *Salk.* 597. 2 *Str.* 787. *Caf. temp.* 5 *Jac. I.*

<sup>b</sup> *Com. Dig.* tit. *Pleader*, C. 10.

<sup>c</sup> 2 *Bur.* 1120.

and

and paid out of court, to the plaintiff or his attorney; and the plaintiff, upon the trial, shall not be permitted to give evidence for the sum brought in<sup>d</sup>: which rule should be accompanied with the general issue, or other plea, to the residue of the demand<sup>e</sup>.

Thus in *assumpsit*<sup>f</sup>, or *covenant*<sup>g</sup> for the payment of money, the defendant may bring money into court: and in *covenant* to find diet and lodging, or pay ten pounds, the court allowed him to bring in the ten pounds<sup>h</sup>. In *debt* for rent, the defendant was formerly allowed to bring money into court<sup>i</sup>; as is done in the Common Pleas<sup>k</sup>, and Exchequer<sup>l</sup>: but this court refused it, in the time of Lord *Hardwicke*<sup>m</sup>; and in a case previous to that time<sup>n</sup>, the court said they never did it in *debt*. But there is a distinction between those actions of debt, wherein the plaintiff cannot recover less than the sum demanded, as on a record, specialty, or statute, giving a

<sup>d</sup> Say. Rep. 196, 7. 2 Bur. 1120. Barnes, 284.  
1121. 3 Bur. 1773. Imp. <sup>h</sup> 8 Mod. 305.  
K. B. 261, 2.; and see App. <sup>i</sup> 2 Salk. 596, 7.  
pend. Chap. XXV. <sup>k</sup> Barnes, 280, 282. Pr.

<sup>e</sup> Barnes, 339, 350. Reg. 257.  
<sup>f</sup> 1 Vent. 356. 2 Salk. <sup>l</sup> Bunb. 124.  
596, 7. <sup>m</sup> Cas. temp. Hardw. 173.  
<sup>g</sup> 2 Salk. 596. 1 Will. 75. <sup>n</sup> 2 Str. 890.

sum certain by way of penalty<sup>o</sup>; and those actions, wherein the plaintiff may recover less, as in debt for rent<sup>p</sup>, or on a simple contract<sup>q</sup>. In the former, the defendant cannot bring money into court<sup>r</sup>; though he may move to stay the proceedings, on payment of the whole debt and costs<sup>s</sup>: but in the latter, the defendant has been allowed to bring money into court<sup>t</sup>; because the plaintiff does not recover according to his demand, but according to the verdict of the jury. And the defendant, by act of Parliament<sup>u</sup>, may bring money into court, in debt, covenant, or other action on a policy of assurance.

In an action for *general* damages, upon a contract<sup>v</sup>, or for a tort<sup>w</sup> or trespass<sup>x</sup>, as a tender cannot be pleaded, so the defendant is not allowed to bring money into court. But in an action of *assumpsit* against a carrier, for not delivering goods, the defendant having advertised

<sup>o</sup> Cro. Jac. 128, 498, 629. § 7. 3 Bur. 1773.

<sup>3</sup> Mod. 41.

<sup>v</sup> 1 Vent. 356. 2 Blac.

<sup>p</sup> 5 Mod. 212.

Rep. 877.

<sup>q</sup> 1 H. Blac. 249.

<sup>w</sup> 2 Str. 787, 906. 7 T.

<sup>r</sup> 2 Str. 890. Barnes, 285.

R. 335.; but money may be

<sup>s</sup> *Ante*, 452.

brought into court, in an ac-

<sup>t</sup> 1 Vent. 356. 2 Salk.

tion on the *case* for navigation-

396, 7.

calls. 7 T. R. 36.

<sup>u</sup> Stat. 19 Geo. II. c. 37.

<sup>x</sup> 2 Wilf. 115.

that

that he would not be answerable for any goods beyond the value of twenty pounds, unless they were entered and paid for accordingly, the court allowed him to bring the twenty pounds into court<sup>1</sup>. And where, in an action for general damages, the bringing of money into court is irregular, if the plaintiff take it out, he thereby waives the irregularity, and cannot afterwards have a verdict, unless he recover more than the sum brought in<sup>2</sup>.

In an action by an executor or administrator, the plaintiff not being liable to costs, the defendant was not formerly allowed to bring money into court<sup>3</sup>: but now it is otherwise<sup>4</sup>; and the effect of the rule will be, not to make the plaintiff pay, but only to lose his subsequent costs. And in actions against justices of the peace<sup>5</sup>, or officers of the excise<sup>6</sup> or customs<sup>7</sup>, for any thing done in the execution of their offices, "in case the defendants shall have neglected to

<sup>1</sup> *Hutton v. Bolton*, E. 22 Geo. III. 1 H. Blac. 299. have been the first statute, which allows money to be brought into court, in an action for general damages.

<sup>2</sup> 1 T. R. 710.

<sup>3</sup> 2 Salk. 596.

<sup>4</sup> 2 Str. 796.

<sup>5</sup> Stat. 24 Geo. II. c. 44.

<sup>6</sup> 4. And note, this seems to

<sup>7</sup> Stat. 23 Geo. III. c. 70.

§ 33.

<sup>8</sup> Stat. 24 Geo. III. Sess.

2. c. 47. § 35.

"tender



“ tender any, or shall have tendered insufficient  
 “ amends, before the action brought, they may  
 “ by leave of the court, at any time before issue  
 “ joined, pay into court such sum of money as  
 “ they shall see fit; whereupon such proceedings,  
 “ orders, and judgments shall be had, made,  
 “ and given, in and by such court, as in other  
 “ actions where the defendant is allowed to pay  
 “ money into court.”

Where there are several counts or breaches in the declaration, and as to some of them the defendant may bring money into court, but not as to the others, he may obtain a rule for bringing it in specially, upon some of the counts or breaches only. Thus, where an action of *covenant*<sup>f</sup> was brought upon a lease, for non-payment of rent, and not repairing, &c. the court made a rule, that upon payment of what should appear to be due for rent, the proceedings as to that should be stayed; and as to the other breaches, that the plaintiff might proceed as he should think fit. So, in *covenant* upon a charter-party<sup>g</sup>, the defendant was allowed to bring

<sup>f</sup> 2 Salk. 596. 1 Will. 75. 256. 2 Blac. Rep. 837.  
 Barnes, 350. 1 Vent. 356. <sup>g</sup> 2 Bur. 1120.  
*contra*; and see Pr. Reg. C. P.

money into court, upon two of the breaches only; viz. for freight and demurrage. If a defendant bring money into court, upon some of the counts, and the plaintiff take it out, the latter is only entitled to the costs of those counts<sup>b</sup>.

The motion for leave to bring money into court is a motion of course, and should regularly be made before plea pleaded<sup>c</sup>; but it is frequently made<sup>k</sup>, and in some cases expressly authorized<sup>l</sup>, *after* plea, on obtaining a judge's order for that purpose: and if there has been no delay<sup>m</sup>, the court will give the defendant leave to withdraw the general-issue, in order to bring money into court, and replead it, on payment of costs. The motion-paper being signed by counsel, the money should be paid to the signer of the writs<sup>n</sup>, who acts in this instance as deputy to the master<sup>o</sup>; and will give a receipt for the money, on being paid 20s. for every 100*l.* and so in proportion for every greater or lesser sum exceeding 10*l.* and 2s. for every sum under 10*l.* besides 2s. 4*d.* for the receipt<sup>p</sup>. On

<sup>b</sup> 4 T. R. 579.

<sup>m</sup> 2 Str. 1271. Barnes,

<sup>l</sup> 1 Ld. Raym. 398. 1 Willf. 289, 362.

157. Barnes, 279.

<sup>n</sup> Imp. K. B. 260.

<sup>k</sup> 1 T. R. 711.

<sup>o</sup> 1 Crompt. 148.

<sup>l</sup> Stat. 24 Geo. II. c. 44. § 4.

<sup>p</sup> R. H. 5 Jac. I.

a plea of *tender*, with a *proferit in curiâ*, the sum tendered must be paid to the signer of the writs, who will give a receipt for it in the margin of the plea<sup>9</sup>; and if not so paid, the plaintiff may consider the plea as a nullity, and sign judgment<sup>\*</sup>.

The rule to bring money into court is drawn up by the clerk of the rules, in term-time, or within a week after, on the motion-paper and receipt being left with him as instructions; but after a week from the end of the term, there must be a judge's order for drawing up the rule, which is granted of course, without a summons<sup>\*</sup>. And the rule is commonly drawn up with costs, to be taxed by the master. But where the plaintiff's conduct appeared to be oppressive, the court on motion discharged so much of the rule, for bringing money into court, as related to the payment of costs<sup>†</sup>: And where the defendant, after action brought and before declaration, has tendered the sum, which he afterwards brings into court, and offered to pay costs up to that time, it seems but reasonable that he should not be liable to the payment of any further costs. A copy of the rule is usually annexed to the

<sup>9</sup> Imp. K. B. 268.

<sup>\*</sup> Imp. K. B. 260.

<sup>†</sup> 1 Str. 638.

<sup>\*</sup> 1 Bur. 578.

plea,

plea, or otherwise served on the plaintiff's attorney.

Bringing money into court is an acknowledgment of the right of action, to the amount of the sum brought in<sup>u</sup>; and therefore the plaintiff, on producing an office-copy of the rule, is entitled to receive it at all events, whether he proceed in the action or not, and even though he be nonsuited<sup>v</sup>, or have a verdict against him<sup>w</sup>:

<sup>u</sup> 5 Bur. 2640. 2 T. R. 275.

<sup>v</sup> It has been doubted, whether the plaintiff can be *nonsuited*, after bringing money into court; but there seems to be little reason for such a doubt. When money is brought into court, unless the plaintiff will accept of it with costs, in discharge of the suit, it is considered as paid before action brought, and struck out of the declaration; and the action proceeds for the residue of the demand, in like manner as if it had been originally commenced for that only. 3 T. R. 657. And accordingly, the practice of nonsuiting the plaintiff, after money paid into court, appears to be supported by

many authorities. See 2 Salk. 597. Pr. Reg. 250. Caf. Pr. C. P. 36. S. C. Caf. *temp.* Hardw. 206. 2 Str. 1027. S. C. 4 T. R. 10. 7 T. R. 372. 2 H. Blac. 374. It seems therefore, that after payment of money into court, there may be a nonsuit, a judgment as in case of a nonsuit, a demurrer to evidence, a plea *puis darrein continuance*; in short, that the cause goes on substantially in the same manner, as if the money had not been paid in at all. 2 H. Blac. 375. *per Eyre*, Ch. Just.

<sup>w</sup> 2 Salk. 597. 2 Str. 1027. Caf. *temp.* Hardw. 206. S. C. Pr. Reg. 250. Caf. Pr. C. P. 36. S. C.

And

And being an acknowledgment on record, the party can never recover it back again, though it afterwards appear that he paid it wrongfully\*. But beyond the amount of the sum brought in, bringing money into court is no acknowledgment of the right of action<sup>†</sup>; and therefore if the plaintiff proceed further, it is at his peril. Where the declaration contains a count on a special contract, bringing money into court *generally*, is an admission of the contract, so as to supersede the necessity of proving it at the trial<sup>‡</sup>: therefore in such case, if the defendant mean to deny the existence of the contract, he should \*pay money into court *especially*, on the other counts of the declaration.

When money is brought into court, the plaintiff either accepts of it with costs, in discharge of the suit, or proceeds in the action: In the former case, he should take an office copy of the rule, and procure an appointment thereon from the master to tax the costs, and serve the same on the defendant's attorney<sup>§</sup>; or in default thereof, it will be considered that the

\* 2 T. R. 645.

579. 5 T. R. 575. 2 H.

† 1 T. R. 464. and see Blac. 374. *Bryan v. Wil-*3 T. R. 657. 4 T. R. 579. *liamson, M.* 38 G. III. C. P.

§ 2 T. R. 275. 4 T. R. \* Imp. K. B. 259.



plaintiff intends to proceed in the action, to recover a larger sum than that paid into court<sup>b</sup>. The costs being taxed and demanded, the plaintiff, if they are not paid, must proceed in the action, and cannot have an attachment<sup>c</sup>; for the rule in this court is conditional, and not, as in the Common Pleas<sup>d</sup>, obligatory upon the defendant to pay the costs.

If the plaintiff proceed in the action, the sum brought into court is, by the terms of the rule, to be struck out of the declaration, and paid out of court to the plaintiff or his attorney; and upon the trial of the issue, the plaintiff shall not be permitted to give evidence for the same: In such case, if the plaintiff proceed to trial<sup>e</sup>, otherwise than for the non-payment of costs, and do not prove more to be due to him, than the sum brought in, the plaintiff, on the rule being produced<sup>f</sup>, shall be nonsuited, or have a verdict against him<sup>g</sup>, and pay costs to the defendant<sup>h</sup>: But if more appear to be due to him, he shall have a

<sup>b</sup> R. M. 31 G. III. 4 T. Say. Rep. 196, 7. 2 Bar. R. 12.

1121.

<sup>c</sup> 2 Str. 1220. 7 T. R. 6. <sup>f</sup> 5 Com. Dig. 20.

<sup>d</sup> Barnes, 283. Pr. Reg. <sup>g</sup> Caf. temp. Hardw. 260.

259. S. C.

<sup>h</sup> 4 T. R. 15. 1 T. R.

<sup>e</sup> 2 Salk. 597. 2 Str. 1027. 710. *Jewb. contra.*

Caf. temp. Hardw. 206. S. C.

verdict

verdict for the overplus, and costs<sup>1</sup>. Where the plaintiff proceeds further, without going on to trial, he shall have his costs, to the time of bringing money into court; and the defendant be allowed his subsequent costs<sup>2</sup>. After the defendant had brought money into court, the plaintiff proceeded to trial, and a juror being withdrawn by consent, it was held that the plaintiff was not entitled to costs, up to the time of bringing the money into court<sup>3</sup>. And where the defendants in several actions on a policy of assurance, paid money into court, which the plaintiff took out, without taxing the costs at that time; and afterwards they entered into the common consolidation rule; and the plaintiff was nonsuited, in the action that was tried; the court, we have seen<sup>4</sup>, held that the latter was not entitled to the costs in any of the actions, up to the time of paying money into court.

<sup>1</sup> *Caf. temp. Hardw.* 260.<sup>1</sup> *T. R.* 657.<sup>2</sup> *1 T. R.* 629. *Say. Rep.*<sup>2</sup> *Ante*, 534.196. *contra*.

## CHAP. XXVI.

*Of PLEAS to the JURISDICTION, claiming  
CONUSANCE, and PLEAS in ABATE-  
MENT.*

THE General Order of Pleading is,

1. *To the Jurisdiction of the Court.*
2. *To the Person,*
  1. *Of the Plaintiff:*
  2. *Of the Defendant.*
3. *To the Count.*
4. *To the Writ; and herein,*
  1. *To the Form:*
  2. *To the Action of the Writ.*
5. *To the Action itself, in Bar thereof<sup>a</sup>.*

By this order of pleading, each subsequent plea admits the former: As when the defendant pleads to the person, he admits the jurisdiction of the court; when he pleads to the count, he admits the competency of the plaintiff, and his own responsibility; when he pleads to the form

<sup>a</sup> Co. Lit. 303. Latch, 178. Gilb. C. P. 49.

of the writ, he admits the form of the count<sup>b</sup>; and in like manner of the rest.

Pleas to the jurisdiction of the court are either in *local* or *transitory* actions. In *local* actions, it is a good plea to say that the lands are ancient-demesne, holden of the king's manor<sup>c</sup>; or that the cause of action arose in *Wales*<sup>d</sup>, or beyond the sea<sup>e</sup>, or in a county-palatine<sup>f</sup>, cinque-port<sup>g</sup>, or other *exempt* jurisdiction<sup>h</sup>. In *ejectment*, the tenants in possession cannot plead to the jurisdiction, without leave of the court<sup>i</sup>: and where ancient-demesne is pleaded, there must be an affidavit, stating that the lands are holden of a manor, which is ancient-demesne; that there is a court of ancient-demesne, regularly holden; and that the lessor of the plaintiff has a freehold interest<sup>k</sup>.

<sup>b</sup> Gilb. C. P. 50.

Keilw. 88, &c. S. C. 3 Inst.

<sup>c</sup> Herne, 7, 351. Raftal, 101. Hans. 103. Thomp. 2.

Cl. 7. but see Yelv. 12, 13. Carth. 109.

<sup>3</sup> Inst. Cl. 8, 9. 1 Salk. 56.

<sup>h</sup> Bro. Abr. tit. *Consuance*,

<sup>2</sup> Ld. Raym. 1418.

52. 1 Blac. Rep. 197.

<sup>d</sup> 1 Willf. 193.

<sup>1</sup> 1 Barnard. K. B. 7,

<sup>e</sup> 1 Salk. 80. 1 Show. 191. S. C.

352, 365. Andr. 368. 2 Str. 1120. 1 Blac. Rep. 197.

<sup>f</sup> Raftal, 419. Herne, 7.

<sup>3</sup> Willf. 51.

<sup>3</sup> Inst. Cl. 14.

<sup>k</sup> 2 Bur. 1046.

<sup>g</sup> 4 Inst. 224. Jenk. 190.

In *transitory* actions, it is said<sup>1</sup>, the defendant cannot plead to the jurisdiction of the court, unless the plaintiff by his declaration shew, that the cause of action accrued within a county-palatine. And even then, it must be averred in the plea, either that the defendant dwells in the county-palatine, or that he hath sufficient goods and chattels there, by which he may be attached; otherwise the plea cannot be allowed, lest a failure of justice should ensue<sup>m</sup>: and the defendant cannot in such case demur to the declaration<sup>n</sup>, or move in arrest of judgment<sup>o</sup>.

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Of a nature very similar to pleading to the jurisdiction of the court, is claiming *Conusance*<sup>p</sup>; or praying that the cause may be determined before an inferior jurisdiction: concerning which, it will be proper to consider, the several sorts of inferior jurisdictions; in what cases conusance may be claimed; and the time and manner of claiming it.

<sup>1</sup> 4 Inst. 212, 213. 1 Sid. S. C.  
 103. Carth. 109. Gilb. C. <sup>o</sup> Carth. 11. Comb. 30, 48.  
 P. 191. 1 Bac. Abr. 560. S. C. and see Comb. 115.  
<sup>m</sup> Carth. 355. <sup>p</sup> Gilb. C. P. 191. 1 Bac.  
<sup>n</sup> *Id.* 354. 5 Mod. 144. Abr. 560. 1 Rol. Abr. 489.

There



There are three sorts of inferior jurisdictions<sup>1</sup>. The first is to *bold pleas*, which is merely a concurrent jurisdiction; and can neither be claimed nor pleaded. The second is a *general conusance* of pleas; which, being intended for the benefit of the lord, may be claimed by him, though it cannot be pleaded by the defendant. The third is *conusance* of pleas, with *exclusive* words; as where the king grants to a city, that the inhabitants shall be sued within the city, *and not elsewhere*: This being an *exempt* jurisdiction, may be either claimed or pleaded<sup>2</sup>. Hence it is a general rule, that wherever the defendant can plead to the jurisdiction of the court, there the lord of the franchise may claim conusance, but not *vice versa*<sup>3</sup>.

The privilege of claiming conusance is confined to courts of record<sup>4</sup>, and *local* actions<sup>5</sup>; except where the defendant is a member of the University of *Oxford* or *Cambridge*<sup>6</sup>. And it

<sup>1</sup> Palm. 456. Hardr. 509. 52. 1 Blac. Rep. 197.

<sup>2</sup> Ld. Raym. 836. 1 Salk. <sup>3</sup> Gilb. C. P. 193.

148. 3 Salk. 79. 12 Mod. <sup>4</sup> 2 Inst. 140.

643. S. C. *Id.* 656. 10 Mod. <sup>5</sup> 4 Inst. 213. 1 Sid. 103.

126. Vin. Abr. tit. *Conusance*, <sup>6</sup> Gilb. C. P. 193. 1 Bac. 589. Abr. 560.

<sup>7</sup> Bro. Abr. tit. *Conusance*,

is also confined to such actions as were in *esse* at the time of the grant<sup>w</sup>, and does not extend to those created since, by act of Parliament; except where a common law action is given against a person by another name, as *debt* against an administrator<sup>x</sup>. Neither shall this privilege be allowed, where the franchise cannot give a remedy<sup>y</sup>, and there would consequently be a failure of justice<sup>z</sup>; as in replevin<sup>a</sup>, *quare impedit*<sup>b</sup>, waste, &c. or where the lord is a party, and the plea is to be holden before himself<sup>c</sup>, or the defendant is a stranger, who hath nothing within the franchise<sup>d</sup>; or lastly, where the plaintiff is a privileged person, as an attorney or officer of the court<sup>e</sup>. But conusance may be claimed by a defendant, in custody of the marshal<sup>f</sup>.

Conusance of pleas must be claimed after appearance<sup>g</sup>, and before imparlance<sup>h</sup>, in the first

<sup>w</sup> 14 Hen. IV. 20. b.

<sup>x</sup> *Id.* 22 Ed. IV. 22.

<sup>y</sup> 2 Vent. 363.

<sup>z</sup> Hardr. 507.

<sup>a</sup> 2 Inst. 140.

<sup>b</sup> Dalis. 12.

<sup>c</sup> 8 Hen. VI. 18, 19, 20, 21. Hob. 87.

<sup>d</sup> 22 Aff. 83. 1 Rol. Abr.

493.

<sup>e</sup> 3 Leon. 149. Lit. Rep.

304. Vin. Abr. tit. *Conusance*, 592. Bendl. 233. cont.

<sup>f</sup> Bro. Abr. tit. *Conusance*,

50 1 Salk. 2. Gilb. C. P. 195.

<sup>g</sup> Comb. 319.

<sup>h</sup> 1 Sid. 103. 1 Show. 352.

10 Mod. 125. 1 Barnard. K. B. 66. 2 Willf. 411. Vin.

Abr. tit. *Conusance*, 590. Gilb. C. P. 196.

instance,

instance, or on the very first day the party hath in court; even upon the return-day of the writ, if the cause of action appear therein: if not, then upon the first day given upon the declaration<sup>1</sup>. As for instance, in *trespass* by original, where place is named, or *precipe quod reddat*, where land is demanded, conusance must be claimed upon the return-day of the writ; because in these cases, the writ states where the cause of action arises<sup>2</sup>. But in *debt* or *detinue* 'tis otherwise: for it does not appear, till the plaintiff has counted, where the contract or obligation was made; and therefore till then, the lord need not make his claim<sup>3</sup>. So in *replevin*, the place where the cattle were taken does not appear, till the plaintiff has counted, if it be between strangers: but if a replevin be sued against the lord of the franchise himself, there the lord's claim would come too late after the count; because the law intends, that he knew the place of taking, being himself a party, and so, by not demanding his privilege on the writ, he gives the court seisin of the cause: For the lord must use no delay<sup>4</sup>.

<sup>1</sup> 2 Will. 413.

<sup>2</sup> 5 Bur. 2823.

<sup>3</sup> 10 Mod. 127.

<sup>4</sup> 5 Bur. 2823.

As

As to the manner of making the claim, it is holden, that conusance may be claimed by the lord of the franchise in person, or by his bailiff or attorney<sup>n</sup>: If it be claimed by attorney, the warrant of attorney must be produced in court, and filed<sup>o</sup>. The grant of conusance must also be produced<sup>p</sup>, or an exemplification of it under the great seal<sup>q</sup>; and if the grant was before time of memory, an allowance must be shewn in the King's Bench, or before justices in *Eyre*<sup>r</sup>. Upon a claim made by the University of *Oxford* or *Cambridge*<sup>s</sup>, there must be likewise, in addition to the grant, an exemplification of the statute confirming it<sup>t</sup>; together with an affidavit of the defendant's residence<sup>u</sup>. The claim itself must be entered upon a roll<sup>v</sup>; and after stating the several proceedings that have been had in

<sup>n</sup> Bro. Abr. tit. *Conusance*, Abr. tit. *Conusance*, 51.

50. 12 Mod. 644, 666.

<sup>o</sup> 10 Mod. 126. 1 Blac.

<sup>p</sup> Palm. 456. 1 Sid. 103. Rep. 454.

1 Lev. 89.

<sup>t</sup> 13 Eliz. c. 29.

<sup>r</sup> 12 Mod. 644. 1 Blac.

<sup>u</sup> 1 Barnard. K. B. 49.

Rep. 454.

65. 2 Str. 810. 2 Willf. 311.

<sup>q</sup> 5 Bur. 2820.

1 Blac. Rep. 454. 5 Bur.

<sup>s</sup> Keilw. 189, 190. 1 Sid.

2820.

103. 1 Salk. 183. 1 Ld.

<sup>v</sup> Comb. 319. 1 Barnard.

Raym. 427, 8, 475. S. C.

K. B. 65. 2 Str. 810.

Gilb. C. P. 195. but see Bro.

the cause, must set forth the grounds upon which it is made, with great precision<sup>w</sup>. It may be demurred to; or the facts therein alleged may be controverted by pleading<sup>x</sup>. If allowed, a day is given, upon the roll, for the lord of the franchise to hold his court; and the parties are commanded to be there on that day<sup>y</sup>. But the record still remains in the court above; and a transcript only is sent down to the court below<sup>z</sup>: so that if justice be not done there, as if the defendant be a stranger, and has nothing within the franchise, by which he can be summoned, or if the judge misbehave himself, &c. the plaintiff shall have a re-summons<sup>a</sup>, upon the record in the court above. And if a re-summons issue, upon failure of right in a franchise, the lord of the franchise shall never afterwards have consufance of that plea<sup>b</sup>.

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Pleas in abatement to the person of the *plaintiff*, are either that he is not in existence, (being

<sup>w</sup> 2 Will. 409, 10.

<sup>x</sup> *Id.* Comb. 319.

<sup>y</sup> 2 Ld. Raym. 836, 7.

12 Mod. 644. 3 Salk. 79.  
S. C.

<sup>z</sup> *Id.* Jenk. 31.

<sup>a</sup> *Id.* Hardr. 407. but see

Vin. Abr. tit. *Consufance*, 589.

10 Mod. 127.

<sup>b</sup> Jenk. 34.

only



only a fictitious person<sup>c</sup>, or dead<sup>d</sup>,) or else that being in existence, he is an alien-enemy<sup>e</sup>, attainted of treason or felony<sup>f</sup>, outlawed upon mesne or final process<sup>g</sup>, under a *præmunire*<sup>h</sup>, excommunicated<sup>i</sup>, or convicted of popish recusancy<sup>k</sup>. Where the cause of action is forfeited, as by the plaintiff's being an alien-enemy<sup>l</sup>, attainted<sup>m</sup>, or outlawed for felony<sup>n</sup>, there his disability may be pleaded in abatement or in bar; but otherwise it can only be pleaded in abatement.

Pleas in abatement to the person of the *defendant*, are that he is privileged, as an attorney or officer of the court<sup>o</sup>; under the king's protection<sup>p</sup>; or an infant<sup>q</sup>, when sued as heir on the obligation of his ancestor, &c.; in which latter case, the *parol* shall demur, or proceedings be stayed, till he come of age.

<sup>c</sup> Ast. Ent. 10. 3 Inst. Cl. 89.

<sup>d</sup> Ast. Ent. 8. 3 Inst. Cl. 75, &c.

<sup>e</sup> Lutw. 34. 3 Inst. Cl. 16.  
*Alien-enemy* is a good plea in bar to the action. 6 T. R. 23, 35.

<sup>f</sup> Carth. 137, 8.

<sup>g</sup> Lutw. 6, 1529. 3 Inst. Cl. 23, &c.

<sup>h</sup> Co. Lit. 129. b.

<sup>i</sup> Lutw. 17. 3 Inst. Cl. 18.

<sup>k</sup> 3 Inst. Cl. 20. 1 Str. 520.

<sup>l</sup> Co. Lit. 129. b.

<sup>m</sup> Bro. V. M. 252.

<sup>n</sup> Co. Lit. 128. b. Gilb.

C. P. 200.

<sup>o</sup> 1 Lutw. 639.

<sup>p</sup> 2 Bro. Ent. 106.

<sup>q</sup> Rastal, 360, 362, 379. Bro. R. 195.

Under

Under the head of pleas to the person, may also be included *Coverture*, in the plaintiff<sup>r</sup> or defendant<sup>s</sup>; or that the plaintiffs or defendants, suing or being sued as husband and wife, are not married<sup>t</sup>; or any other plea for want of proper parties, as that there is an executor<sup>u</sup>, administrator<sup>v</sup>, or other person<sup>w</sup>, not named, who ought to be made a co-plaintiff or co-defendant. We have already seen, that if an action be brought for a tort, by one of several joint-tenants or tenants in common<sup>x</sup>, or against one of several partners, upon a joint contract<sup>y</sup>, the defendant must plead in abatement, and cannot otherwise take advantage of the objection. It should also be observed, that if an action be brought against a carrier in *case*, on the custom

<sup>r</sup> Art. Ent. 9. 3 Inst. Cl. 70. If the plaintiff take husband, after suing out the writ, and before the declaration, the defendant cannot give the coverture in evidence under the general issue, but must plead it in abatement. 6 T. R. 265.

<sup>s</sup> 1 Lutw. 23. 3 Inst. Cl. 71.

<sup>t</sup> 3 Inst. Cl. 69.

<sup>u</sup> *Id.* 51. Rastal, 325. 2.

<sup>v</sup> 3 Inst. Cl. 53. Rastal, 324.

<sup>w</sup> 3 Inst. Cl. 53, 119. 1 Lutw. 696.

<sup>x</sup> *Ante*, 10. And see 1 Salk. 32, 290. 2 Str. 820.

<sup>y</sup> *Ante*, 9. But see 2 Mod. 279. 3 Mod. 321. 2 Salk.

440. Show. 29, 101. 3 Lev. 258. Carth. 58. S. C. Gilb. Evid. 189.

of

of the realm, for not safely carrying goods, the defendant may plead in abatement, that his partners ought also to have been sued<sup>a</sup>: Or if an action of debt be brought on the statute 9 Ann. c. 14. to recover back money won at play, he may plead in abatement, that the money was due from others not named, as well as from himself<sup>a</sup>. In a plea in abatement, that another person ought to have been sued with the defendant, it is not necessary to lay a venue: And if it be pleaded that such other person is alive, to wit in *Spain*, it will be considered as pleaded without any venue<sup>b</sup>.

Pleas in abatement of the *count* can only be pleaded in actions by original writ; and are for some uncertainty, repugnancy, or want of form<sup>c</sup>, not appearing on the face of the writ, or else for some variance therefrom<sup>d</sup>.

Pleas in abatement of the *writ* are, either for matter apparent on the face of it, or for matter *dehors*<sup>e</sup>, existing at the time of suing out the writ, or arising afterwards<sup>f</sup>. To the *form* of

<sup>a</sup> 6 T. R. 369. *sed vide ante*, 10.

<sup>a</sup> 7 T. R. 257.

<sup>b</sup> *Id.* 243. *Ante* 333. (q).

<sup>c</sup> 3 Inst. Cl. 62.

<sup>d</sup> Reg. Pl. 277, 8.

<sup>e</sup> Gilb. C. P. 51.

<sup>f</sup> See Com. Dig. tit. *Abatement* (H).

the writ they are, for some apparent uncertainty, repugnancy, or want of form<sup>e</sup>; *variance*<sup>h</sup> from the record, specialty, &c.; *misnomer*<sup>i</sup> of the plaintiff or defendant; or, in actions by original writ, the omission or mistake of the defendant's *addition*<sup>k</sup>, that is, of his estate, degree, mystery, or place of abode. But the plaintiff may sue the defendant, either by the addition of his degree or mystery<sup>l</sup>; and may name him of the place where he *lately* dwelt<sup>m</sup>.

Pleas in abatement to the *action* of the writ are, that the action is misconceived<sup>n</sup>; or was prematurely brought, before the cause of it arose<sup>o</sup>; or that there is another action depending for the same cause<sup>p</sup>. It is said, in one case<sup>q</sup>, that the pendency of a prior action for the same cause may be pleaded in bar to a second action; but it cannot be pleaded in abatement. This however must be understood with reference to

<sup>e</sup> Lutw. 25. 3 Inst. Cl. 556. 2 Str. 816. 2 Ld. Raym. 49, 54, 66, &c. 1541. S. C.

<sup>h</sup> 3 Inst. Cl. 43, &c.

<sup>m</sup> 2 Str. 924.

<sup>i</sup> Lutw. 10. Ast. Ent. 1.

<sup>n</sup> 3 Inst. Cl. 120, &c.

<sup>j</sup> 3 Inst. Cl. 79, &c. but see 2 Str. 1218.

<sup>o</sup> Lutw. 8, 13. 3 Inst. Cl. 56. Fortes. 334.

<sup>k</sup> Stat. 1 Hen. V. c. 5.

<sup>p</sup> Lutw. 33. 3 Inst. Cl. 111.

<sup>l</sup> 3 Inst. Cl. 92.

<sup>q</sup> 8 Mod. 51, 52. 1 Str.

<sup>r</sup> Say. Rep. 216.

the particular case of a *qui tam* action, and not as a general rule applicable to all cases.

The general requisites of a plea in abatement are, that it should be certain to every intent<sup>r</sup>, give the plaintiff a better writ<sup>r</sup>, and have an apt and proper beginning and conclusion: For it is the beginning and conclusion that make the plea<sup>r</sup>. Pleas to the jurisdiction of the court must be pleaded in *person*<sup>n</sup>; and in pleading them, the defendant must make but *half* defence<sup>r</sup>: but pleas in abatement may be pleaded by *attorney*, and with *full* defence<sup>r</sup>. Where the defendant pleads to the writ, for matter *op-  
parent*, he should begin his plea, by praying judgment of the writ, and conclude it in the same manner<sup>r</sup>; but where the plea is for matter *dehors*, as joint-tenancy, non-tenure, or the like, there he should conclude it only in this manner<sup>r</sup>.

<sup>r</sup> Co. Lit. 303. a. Cro.  
Jac. 82. 3 Lev. 67.

<sup>s</sup> Brownl. 139.

<sup>t</sup> 1 Sid. 189. 1 Vent. 136.  
Comb. 106, 7. 1 Show. 4.  
S. C. 1 Ld. Raym. 593.  
1 Salk. 210. S. C. 12 Mod.  
525. 10 Mod. 112, 192,  
210.

<sup>u</sup> Gilb. C. P. 187.

<sup>v</sup> Gilb. C. P. 188. Co. Lit.  
127.

<sup>w</sup> Lutw. 7. *Wheatley v.*  
*Cudmerston*, M. 15 Geo. II. C.  
*P. Thompson v. Stockdale*, H.  
23 Geo. III. K. B.

<sup>x</sup> Moor, 30. Dalis. 33. S.  
C. Reg. Pl. 273. Lutw. 11.  
12 Mod. 525.

<sup>y</sup> Same cases.

A plea



A plea of misnomer of the defendant; beginning, "And *the said Richard*, sued by the name of *Robert, &c.*" is bad <sup>a</sup>. In pleading to the jurisdiction, the defendant should conclude his plea by praying judgment, *if the court will take further cognizance of the suit* <sup>a</sup>. In pleading to the person, the conclusion is, *whether the defendant ought to answer, or the plaintiff to be answered* <sup>b</sup>; or if excommunication, or other temporary disability, be pleaded, *that the plaint may remain without day, until, &c.* <sup>c</sup> In pleading to the writ or count, if the action be by *original*, the plea should conclude, by praying judgment *of the writ or count, and that the same may be quashed* <sup>d</sup>. But if the action be by *bill*, the plea should conclude, by praying judgment *of the bill, or of the bill and declaration*, (for they are the same thing,) and not of the *declaration* only <sup>e</sup>. A plea of misnomer, praying judgment *if the bill*, and that the same may be quashed, is ill on special demurrer <sup>f</sup>.

<sup>a</sup> 5 T. R. 487.

<sup>d</sup> 5 Mod. 132.

<sup>b</sup> Latch, 78.

<sup>e</sup> *Id.* 5 Mod. 144. 12 Mod.

<sup>c</sup> *Id. ibid.* Lit. § 195, &c.

133. S. C. 10 Mod. 192;

<sup>e</sup> 3 Lev. 240. Lutw. 19.

210.

<sup>f</sup> Inst. Cl. 18. 1 Str. 521.

<sup>f</sup> 3 T. R. 185.

Pleas to the jurisdiction of the court<sup>e</sup>, (except antient demesne<sup>b</sup>,) and pleas in abatement<sup>l</sup>, ought to be pleaded before a *general* imparlance; and they must be pleaded within four days *inclusive*<sup>k</sup> after the delivery, or filing and notice, of the declaration<sup>l</sup>; unless the declaration be delivered or filed after term, or so late in the term, that the defendant is not bound to plead to it that term; in both which cases, the defendant may, within the first four days *inclusive* of the next term, plead to the jurisdiction of the court, or in abatement, as of the preceding term<sup>m</sup>. If such a plea be pleaded after a *general* imparlance, the

- <sup>e</sup> Dyer, 210. b. *in margine*.      <sup>k</sup> 1 T. R. 277. 5 T. R. 210.  
 T. Raym. 34. 1 Keb. 137.      <sup>l</sup> 11 Mod. 2. 2 Str. 1192.  
 S. C. Gilb. K. B. 317, 344.      1 Wilf. 23. S. C. 2 Str.  
 Gilb. C. P. 183, 184, 187.      1268. 1 T. R. 277, 689.  
 4 Bac. Abr. 28, 9.      7 T. R. 298. And see Gilb.  
<sup>b</sup> Dyer, 210. b. *in margine*.      C. P. 52. Pr. Reg. 3. Caf.  
 Latch, 83. Cro. Car. 9. Sty.      Pr. C. P. 23. S. C. Pr. Reg.  
 Rep. 90. Vin. Abr. tit. *Con-*      286. Caf. Pr. C. P. 63. S. C.  
*nusance*, p. 591.      But see Sty. P. R. 458, 468.  
<sup>l</sup> 2 Keb. 143. 1 Mod. 14.      R. E. 5 Ann. (a). 1 T. R.  
 1 Vent. 184. 1 Lutw. 23.      278, 9. from whence it should  
 Sty. P. R. 465. Gilb. K. B.      seem, that they ought to be  
 344. R. E. 5 Ann. (a). R. T.      pleaded, before the rule for  
 5 & 6 Geo. II. (b). 1 Str. 523.      pleading is expired.  
 4 T. R. 520. 6 T. R. 369.      <sup>m</sup> 1 Salk. 367. Gilb. K. B.  
 7 T. R. 447. (d). Barnes,      344, 5.  
 224, 334.

plaintiff,

plaintiff, we have seen<sup>a</sup>, may either sign judgment, or apply to the court by motion to set it aside, or he may demur thereto, or alledge the imparlance in his replication, by way of estoppel. And if it be not delivered, or left in the office, in due time, it is not to be received, whether a rule to plead be given or not<sup>o</sup>. And *Sunday*, or any other day on which the court does not sit, is to be accounted as one of the four days, unless it happen to be the last<sup>p</sup>.

Before the statute for the amendment of the law, where the defendant pleaded a *foreign* plea, he was obliged to verify it by affidavit<sup>q</sup>. And now, by that statute<sup>r</sup>, "No *dilatory* plea shall be received in any court of record, unless the party offering such plea do, by affidavit, prove the truth thereof; or shew some probable matter to the court, to induce them to believe that the fact of such dilatory plea is true."

<sup>a</sup> *Ante*, 384, 5. But it there appears, that after a *special* imparlance, the defendant may plead in abatement, though not to the jurisdiction of the court. 7 T. R. 298. 2 R. E. 5 Ann. (a). 1 T. R. 279. 3 T. R. 642. 5 T. R. 210. 2 Lil. P. R. 299. Sty. Rep. 435. Carth. 402.

<sup>o</sup> 1 Lil. P. R. 3. R. E. 5 Mod. 335. S. C. 5 Ann. (a). 1 T. R. 278, 9. <sup>r</sup> 4 & 5 Ann. c. 16. § 11.

The affidavit required by this statute, may be made by the defendant himself, or a third person<sup>s</sup>; and as the statute only requires probable cause, there does not seem to be any necessity for an affidavit, where the plea is for matter apparent, as want of addition<sup>t</sup>, &c. Yet where the defendant pleaded, after oyer of the original, that it was not returned, the court set aside the plea, for want of an affidavit of the truth of it<sup>v</sup>.

A plea in abatement should be signed by counsel; and filed in the office of the clerk of the papers, with an affidavit that the plea thereto annexed is true in substance and matter of fact<sup>v</sup>. And if the plea be not filed in due time, or if there be no affidavit annexed of the truth of it, the plaintiff may consider it as a nullity, and sign judgment<sup>w</sup>; or the plaintiff may move the court to set it aside<sup>x</sup>.

When a plea in abatement is regularly put in, the plaintiff must reply to it, or demur. If he

<sup>s</sup> Pr. Reg. 6. Barnes, 344.  
S. C. and see Append. Chap. XXVI. [A.]

<sup>t</sup> Pr. Reg. 5.

<sup>u</sup> 1 Str. 639. 2 Ld. Raym. 1409. S. C.

<sup>v</sup> 2 Str. 705, 738. and see Append. Chap. XXVI. [B.]

<sup>w</sup> 1 T. R. 277, 689. 5 T. R. 210. 7 T. R. 298.

<sup>x</sup> 1 Str. 638. Say. Rep. 19, 293. 3 Bur. 1617.

reply,

reply, and an issue *in fact* be thereupon joined, and found for him, the judgment is *peremptory, quod recuperet*<sup>7</sup>; but if there be judgment for the plaintiff, on *demurrer* to a plea in abatement, or replication to such plea, the judgment is only *interlocutory, quod respondeat ouster*<sup>2</sup>: In the latter case, the defendant has in general four days time to plead; but this is in the discretion of the court<sup>3</sup>, and they will sometimes order him to plead *instantly*, or on the morrow. After a judgment of *respondeat ouster*, it is said, there can be no plea in abatement; for if it were allowed, there would be no end of such pleas<sup>b</sup>: But this must be understood of pleas in abatement *in the same degree*, as popish recusancy and outlawry<sup>c</sup>, being both to the person; for the defendant may plead to the person of the plaintiff, and if that be over-ruled, he may afterwards plead to the form of the writ<sup>d</sup>.

The judgment for the *defendant*, on a plea in abatement, whether it be on an issue *in fact* or in *law*, is *that the writ or bill be quashed*<sup>e</sup>; or if a

<sup>7</sup> Gilb. C. P. 53. 2 Wils. 12 Mod. 230.

367.

<sup>e</sup> Hetl. 126.

<sup>2</sup> *Id. ibid.*

<sup>d</sup> Com. Dig. tit. *Abatement*,

<sup>a</sup> Comb. 19.

p. 66. cites Th. D. l. x. c. 1.

<sup>b</sup> 4 Bac. Abr. 51. Gilb.

<sup>c</sup> Gilb. C. P. 52.

C. P. 186. 2 Saund. 40, 41.



temporary disability or privilege be pleaded, as excommunication, or the king's protection, infancy, &c. *that the plaint remain without day, until, &c.* On an issue in fact, the defendant is entitled to *costs*; but not on an issue in law<sup>f</sup>.

<sup>f</sup> 2 Ld. Raym. 992. 1 Salk. 194. S. C.

## CHAP. XXVII.

*Of PLEAS in BAR; and NOTICE of SET-OFF.*

**P**LEAS in bar are calculated to shew, either that the plaintiff never had any cause of action, or if he had, that it is discharged, by some subsequent matter.

In actions upon *contracts*, the grounds of defence are, that there was no contract between the parties, in point of fact; or if there was, that it was void or voidable, in point of law: Or if there was a good and valid contract, that it has been performed; or if not, that there is some legal excuse for the non-performance of it. Upon these grounds, it will appear that the plaintiff never had any cause of action; or admitting that he had, it may be discharged by some subsequent matter, as by accord and satisfaction, arbitrament, release, &c. In actions for *wrongs*, the defendant may shew, that the plaintiff never had any cause of action, by denying the charge, or by justifying or excusing it; or he may discharge the

action, by means similar to those in actions upon contracts.

Considered with reference to the declaration, pleas are in denial, or confession and avoidance, of the cause of action; or they conclude the plaintiff by matter of estoppel<sup>a</sup>. Pleas in denial, are of the whole, or a part of the declaration; and in avoidance, they are by matter precedent, which shews the plaintiff never had a cause of action, and is called an avoidance in law, or by matter subsequent, which discharges the cause of action, and is called an avoidance in fact<sup>b</sup>.

When the defendant means to deny the whole charge contained in the declaration, or that which constitutes the gift or foundation of the action, he should plead the general issue; as, in *assumpsit*, *non assumpsit*; in *debt* on simple contract, *nil debet*; in *debt* on specialty, *non est factum*; in *debt* on record, *nul tiel record*; in *detinue*, *non detinet*; and in *trespass vi et armis*, and *trespass* on the *case*, not guilty.

In *assumpsit*, the general issue is proper, where there was either no contract between the parties,

<sup>a</sup> 5 Hen. 7. 14. 1 Leon. 77. Sav. 86.      <sup>b</sup> 5 Hen. 7. 14.

or not such a contract as the plaintiff has declared on. And the defendant may give in evidence under it, that the contract was *void* in law by coverture<sup>c</sup>, gaming<sup>d</sup>, usury<sup>e</sup>, &c., or *voidable* by infancy<sup>f</sup>, duress, &c.; or if good in point of law, that it was *performed*, by payment<sup>g</sup> or otherwise, or if unperformed, that there was some legal *excuse* for the non-performance of it, as a release or discharge before breach, or non-performance by the plaintiff of a condition precedent, &c. This sort of evidence will shew that the plaintiff had no cause of action. But if he had, the defendant may give in evidence, under the general issue, that it was *discharged* by an accord and satisfaction<sup>h</sup>, arbitrament, account stated, release<sup>i</sup>, foreign attachment<sup>j</sup>, or former recovery for the same cause<sup>k</sup>, &c. In short, the question in *assumpsit*, upon the general issue, is whether there was a subsisting debt, or cause of action, at the time of commen-

<sup>c</sup> 12 Mod. 101.<sup>d</sup> 1 Ld. Raym. 87. 1 Salk.

344. Carth. 356. 5 Mod. 170.

12 Mod. 97. S. C.

<sup>e</sup> 1 Str. 498.<sup>f</sup> 1 Salk. 279.<sup>g</sup> 1 Ld. Raym. 217, 566.

12 Mod. 376. S. C. 1 Salk.

394.

<sup>h</sup> 1 Ld. Raym. 566. 12

Mod. 376. S. C.

<sup>i</sup> Gilb. C. P. 64. Doug.

106, 7.

<sup>j</sup> 1 Salk. 280.<sup>k</sup> 2 Str. 733.

cing the suit<sup>1</sup>. But matters of law<sup>m</sup>, in avoidance of the contract, or discharge of the action, are usually pleaded. And it is necessary to plead a tender, set-off, or the statute of limitations<sup>n</sup>, &c.

In *covenant*, there is, properly speaking, no general issue; for though the defendant may plead *non est factum*, as in debt on specialty, yet that only puts the deed in issue, and not the breach of covenant: and *non infregit conventionem*, to a negative covenant, has been holden to be a bad plea<sup>o</sup>. In this action therefore the defendant must specially controvert the deed, or shew that he has *performed* the covenant, or is legally *excused* from the performance of it; or admitting the breach, that he is *discharged* by matter *ex post facto*, as a release, &c.

<sup>1</sup> Doug. 106, 7.

<sup>m</sup> Hob. 127. 2 Vent. 295. Formerly, matters in discharge of the action must have been pleaded specially. 1 Ld. Raym. 566. 12 Mod. 376. S. C. Afterwards, a distinction was made between express and implied *assumpsits*: In the former, these matters were still required to be

pleaded, but not in the latter.

Vin. Abr. tit. *Evidence*, Z. a. 1 Salk. 280. Gilb. C. P. 65. At length, about the time of Ld. Holt, they were universally allowed to be given in evidence, under the general issue. 1 Ld. Raym. 217, 566. 12 Mod. 376. S. C.

<sup>n</sup> 1 Ld. Raym. 153.

<sup>o</sup> 1 Lev. 182. 3 Lev. 19.



In *debt* on simple contract, *nil debet* is a good plea, or, in actions by executors and administrators, *non detinet*, in all cases where nothing was due to the plaintiff, at the time of commencing the action<sup>p</sup>: And under this plea, the defendant may not only put the plaintiff upon shewing the existence of a legal contract, but he may give in evidence the *performance* of it, or offer an *excuse* for its non-performance. He may also give in evidence, under this plea, a release, or other matter in discharge of the action<sup>q</sup>: And it has even been holden, that, as the plea is in the present tense, the statute of limitations may be given in evidence under it<sup>r</sup>: But in *debt* for rent, on an indenture of lease, if the defendant plead *nil debet*, he cannot give in evidence, that the plaintiff had nothing in the tenements; because, if he had pleaded that specially, the plaintiff might have replied the indenture, and estopped him<sup>s</sup>. And in *debt qui tam*, the defendant was not allowed to give in evidence, on *nil debet*, a former recovery against him, by another person, for the same cause<sup>t</sup>.

P Com. Dig. tit. *Pleader*, 434, 443. *semb. contra.*  
 (2 W. 16.)  
 1 Ld. Raym. 566. 12  
 Mod. 376. S. C. 1 Ld.  
 Raym. 394. S. P. Gilb. *Debt*,  
 1 Ld. Raym. 153.  
 1 Salk. 278.  
 1 Str. 701, 2.

In this action also, as in *assumpsit*, a tender and set-off must be specially pleaded.

Where a specialty is but inducement to the action, and matter of fact the foundation of it, there *nil debet* is a good plea; as in debt for rent by indenture, for the plaintiff need not set out the indenture: so in debt for an escape<sup>u</sup>, or on a *devastavit* against an executor<sup>v</sup>, the judgment is but inducement, and the escape and *devastavit* are the foundation of the action. But where the deed is the foundation, and the fact but inducement, there *nil debet* is no plea; as in debt for a penalty on articles of agreement<sup>w</sup>, or on a bail-bond<sup>x</sup>.

It sometimes happens, that instead of pleading the general issue of *nil debet* to the whole declaration, the defendant, for greater certainty, will select and deny some particular fact, necessary to maintain the action; as the demise in debt for rent on a parol lease, to which he may plead *non demisit*<sup>y</sup>; but he cannot plead this plea, in debt for rent on an indenture<sup>z</sup>; and it is said, that *riens*

<sup>u</sup> 2 Salk. 565.

<sup>v</sup> 1 Saund. 219. Cart. 2.

<sup>w</sup> 2 Ld. Raym. 1500.

<sup>z</sup> Str. 778. 1 Barnard. K.

B. 15. 8 Mod. 106, 323.

382. S. C.

<sup>x</sup> *Id.* Fort. 363, 367.

<sup>y</sup> Gilb. Debt, 438.

<sup>z</sup> *Id.* 436.

*en arrere* is not a good plea, without concluding *et issint nil debet*<sup>a</sup>.

In *debt* on bond, or other specialty, the general issue of *non est factum* is good, in all cases where the deed was not executed, or varies from the declaration<sup>b</sup>. And the defendant may give in evidence under it, that the deed was void at common law *ab initio*<sup>c</sup>, being obtained by fraud, or made by a married woman, lunatic<sup>d</sup>, &c. or that it became void after it was made, and before the commencement of the action<sup>e</sup>, by erasure, alteration, cancelling, &c.; or that it was delivered as an escrow<sup>f</sup>, to a third person. But he cannot give in evidence, under the general issue, that the deed was *voidable*<sup>g</sup>, by infancy, duress, *per minas*<sup>h</sup>, &c. or that it was *void* by act of parliament<sup>i</sup>, as by the 23 *Hen. VI. c. 9.* relating to sheriffs' bonds, or by the statutes of usury<sup>k</sup>, or gaming, &c. In these cases, there-

<sup>a</sup> Gilb. *Debt*, 440. cites <sup>f</sup> 2 Rol. Abr. 683. l. 5: Bro. *Dette*, 113. Keilw. 153. T. Raym. 197. Mod. Caf.

<sup>b</sup> Com. Dig. tit. *Pleader*, 217. (2 W. 18.)

<sup>c</sup> 5 Co. 119. and see <sup>g</sup> 5 Co. 119. a. Gilb. *Debt*, 437. 2 Salk. 675. 1 Ld. Raym. 315. S. C.

2 Will. 341, 347.

<sup>d</sup> 2 Str. 1104.

<sup>e</sup> 5 Co. 119. b. Sav. 71.

*semb. contra.*

<sup>h</sup> 2 Inst. 482, 3.

<sup>i</sup> 5 Co. 119. a.

<sup>k</sup> 1 Str. 498.

fore,

fore, the defendant must plead specially: So he must plead *payment*, at or after the day, *performance*, or any matter in *excuse* of performance, as *non damnificatus* to a bond of indemnity, *no award* to an arbitration-bond, or to a bail-bond, no process to arrest the defendant<sup>1</sup>, &c. He must also plead specially, in *discharge* of the action, a tender, set-off, satisfaction, former recovery, or release, &c.

In *debt* on record, the general issue of *nul tiel record* is proper, where there is either no record at all, or one different from that which the plaintiff has declared on<sup>m</sup>. But as this plea only goes to the existence of the record, the defendant must plead payment, or any matter in discharge of the action.

In *detinue*, the defendant may give in evidence, under the general issue of *non detinet*, a gift from the plaintiff; for that proves he detaineth not the plaintiff's goods<sup>n</sup>. But he cannot give in evidence, that the goods were pawned to him for money, which is not paid; but he must plead it.

In trespass to *persons*, the general issue of not guilty may be properly pleaded, if the defendant

<sup>1</sup> Say. Rep. 116.

<sup>n</sup> Co. Lit. 283.

<sup>m</sup> Gilb. *Debt*, 444. 3 Mod. 41.

committed

committed no assault, battery, or imprisonment, &c.; in trespass to *personal* property, if the plaintiff had no property in the goods; and in trespass to *real* property, if he was not in possession of the land, &c. And *liberum tenementum*, or other evidence of title or right to the possession, may be given in evidence, under the general issue<sup>o</sup>. But regularly, by the common law, matter of excuse or justification must be *specially* pleaded<sup>p</sup>; as in trespass to persons, *son assault demesne*; or in trespass to real property, a licence<sup>q</sup>; that the beasts came through the plaintiff's hedge, which he ought to have repaired; or, in respect of a rent-charge, common, or the like<sup>r</sup>. And the defendant must plead specially a release, or other matter in *discharge* of the action<sup>s</sup>. But in actions against justices, &c. and in various other cases, the defendant, by act of parliament, is allowed to plead the general issue, and give the special matter in evidence<sup>t</sup>.

In actions upon the *case*, the defendant, upon the general issue of not guilty, may not only put

<sup>o</sup> Andr. 108. 7 T.R. 354. *contra*.

<sup>p</sup> Co. Lit. 282, 3. 2 Rol.

Abr. 682. 12 Mod. 120.

<sup>q</sup> Hob. 174, 5. but see

21 Hen. VII. 28. a. *per Rede*,

<sup>r</sup> Co. Lit. 283.

<sup>s</sup> 3 Bur. 1353.

<sup>t</sup> Co. Lit. 283.

the



the plaintiff upon proof of the whole charge contained in the declaration, but may offer any matter in excuse or justification of it<sup>u</sup>; or he may set up a former recovery, release, or satisfaction<sup>v</sup>: For an action upon the case is founded upon the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and in effect is so; and therefore such a former recovery, release, or satisfaction need not be pleaded, but may be given in evidence: Since whatever will, in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery, may, in this action, be given in evidence by the defendant; because the plaintiff must recover upon the justice and conscience of his case; and upon that only. In *trover*, it is commonly said, there is no special plea except a release; but this is a mistake, for the defendant may plead specially any thing else, which, admitting the plaintiff had once a cause of action, goes to discharge it, as the statute of limitations<sup>w</sup>, or a former recovery<sup>x</sup>, &c. In an action for *words*, the truth of the words cannot be given in evi-

<sup>u</sup> 2 Mod. 276, 7. 3 Mod. Rep. 388. S. C.  
 166. Com. Rep. 273. 1 Will.  
<sup>v</sup> 1 Lutw. 99.  
<sup>w</sup> 1 Show. 146.  
<sup>x</sup> 3 Bur. 1353. 1 Blac.

dence;

dence, under the general issue of not guilty<sup>1</sup>. And by the 8 & 9 W. III. c. 27. § 6. "no re-  
 "taking on fresh pursuit shall be given in evi-  
 "dence, on the trial of any issue, in any action of  
 "escape, against the marshal, &c. unless the same  
 "shall be specially pleaded; nor shall any special  
 "plea be received or allowed, unless oath be first  
 "made in writing by the defendant, and filed in  
 "the proper office, that the prisoner, for whose  
 "escape such action is brought, did escape with-  
 "out his consent, privity, or knowledge."

Where the defence consists of matter of fact, and the general issue may, it ought to be pleaded; it being in such case a good cause of demurrer, that the plea amounts to the general issue<sup>2</sup>. But it is observable, that in many cases, where the defence consists of matter of law, the defendant may either plead it specially, or give it in evidence under the general issue; as in *assumpsit*, infancy, accord and satisfaction, or a release, &c. may be either pleaded, or given in evidence upon *non assumpsit*; and in *debt on bond*, made by a married woman, the defendant may either plead coverture, or give it in evidence upon *non est factum*. In these cases, from the nature of the defence, the plaintiff has an *implied*

<sup>1</sup> 2 Str. 1200.

<sup>2</sup> Co. Lit. 303. b. Gilb. C. P. 60, 1.

*colour* of action, bad indeed in point of law, if the facts pleaded be true, but which is properly referred to the decision of the court. And where, from the nature of the defence, the plaintiff would have no implied colour of action, the defendant, in some cases, is allowed to give him an *express colour*<sup>a</sup>. Thus, in the common, and almost only case where express colour is now given, if in an action of trespass *quare clausum fregit*, the defendant plead a possessory title, under a demise from a third person, (for if he claim under the plaintiff, there is an implied colour,) this, without more, would amount to the general issue; for it goes to deny that the trespass was committed in the *plaintiff's* close: but if the defendant, after stating his own title, supposes (as is usual) that the plaintiff entered upon him, under colour of a former deed of feoffment, without livery, and that he re-entered, this creates a question of law, for the decision of the court; and by that means prevents the plea from amounting to the general issue: and being matter of supposal, it is not traversable.

In trespass for taking goods, if the defendant plead that *A.* was possessed of them, as of his

<sup>a</sup> For the difference between *express* and *implied* *Holt*, in *Reg. Plac.* 303.

proper

proper goods, and sold them in market-overt, or that *B.* stole the goods from *A.* and waived them within his manor, wherefore he took them, the defendant must give colour; for his plea proves that no property was in the plaintiff, so he had no colour of action: And the colour usually given in such cases is, that the defendant bailed the goods to a stranger, who delivered them to the plaintiff, from whom the defendant took them. But in the same cases, if the defendant plead that *A.* sold the goods in market-overt, without saying that they were his own, or that *B.* took them *de quodam ignoto*, and waived them, the plea is good without colour; for it does not deny but that the property was in the plaintiff, and the defendant is not bound to shew expressly in whom it was <sup>b</sup>.

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The plea of the general issue is frequently accompanied with a *notice of set-off*; and therefore it will here be proper, to consider the doctrine of setting off mutual debts against each other.

<sup>b</sup> *Dr. Layfield's case*, 10 Co. Doct. & Stud. l. z. c. 53. 90. b. And for more of the doctrine concerning Colour, 3 Salk. 273. 3 Blac. Com. 309. see the same case *per totum*.

At common law, if the plaintiff was indebted to the defendant in as much, or even more than the defendant owed to him, yet he had no method of striking a balance: the only way of obtaining relief, was by going into a court of equity\*. To remedy this inconvenience, it was enacted by the statute 2 Geo. II. c. 22. § 13. "that  
" where there are mutual debts between the  
" plaintiff and defendant, or if either party sue  
" or be sued as executor or administrator, where  
" there are mutual debts between the testator or  
" intestate and either party, one debt may be set  
" against the other; and such matter may be  
" given in evidence upon the general issue, or  
" pleaded in bar, as the nature of the case shall  
" require, so as at the time of pleading the  
" general issue, where any such debt of the  
" plaintiff, his testator or intestate, is intended to  
" be insisted on in evidence, *notice* shall be  
" given of the particular sum or debt so intended  
" to be insisted on, and upon what account it  
" became due; or otherwise such matter shall  
" not be allowed in evidence, upon the general  
" issue." This clause was made perpetual, by the 8 Geo. II. c. 24. § 4.; and it having been doubted, whether mutual debts of a *different* nature could be set against each other, it was by

\* 2 Bur. 820. 4 Bur. 2220.



the last-mentioned statute<sup>d</sup>, further enacted and declared, “ that by virtue of the said clause, “ mutual debts may be set against each other, “ either by being pleaded in bar, or given in “ evidence on the general issue, in the manner “ therein mentioned, notwithstanding that such “ debts are deemed in law to be of a different “ nature; unless in cases where either of the “ said debts shall accrue by reason of a penalty, “ contained in any bond or specialty; and in all “ cases, where either the debt for which the “ action hath been or shall be brought, or the “ debt intended to be set against the same, hath “ accrued, or shall accrue, by reason of any such “ penalty, the debt intended to be set off shall “ be pleaded in bar; in which plea shall be “ shewn, how much is truly and justly due on “ either side; and in case the plaintiff shall re- “ cover in any such action or suit, judgment “ shall be entered for no more than shall ap- “ pear to be truly and justly due to him, after “ one debt being set against the other as afore- “ said.”

The

<sup>d</sup> § 5.

\* The day after the last act a debt by simple contract passed, Lord *Hardwicke* Ch. J. might, by the former act, delivered the opinion of the have been set off against a

The actions, in which a set-off is allowable upon these statutes, are *debt*, *covenant*, and *assumpsit*, for the non-payment of money; and the demand intended to be set off must be liquidated, and such as might have been made the subject of one or other of these actions. A set-off therefore is never allowed in actions upon the *case*, *trespass*, or *replevin*<sup>1</sup>, &c.; nor in debt on bond conditioned for the performance of covenants<sup>2</sup>, &c.; nor in *covenant* or *assumpsit* for general damages: And a penalty<sup>3</sup>, or uncertain damages<sup>4</sup>, cannot be made the subject of a set-off. But where a bond is conditioned for the payment of an annuity<sup>5</sup>, or of *liquidated* damages<sup>6</sup>, a set-off may be allowed: And a judgment may be pleaded by way of set-off, though a writ of error be pending thereon<sup>7</sup>. A debt barred by the statute of limitations cannot be set off; and if it be pleaded in bar to the action, the plaintiff may reply the statute of limit-

specialty debt. *Brown & Holyoak*, 8 Geo. II. Bul. Ni. Pri. 179.

<sup>2</sup> Barnes, 450. Bul. Ni. Pri. 181. S. C. *Graham v. Fraine*, H. 24 Geo. II. and *Laycock v. Tuffnell*, E. 27 Geo. III. K. B. S. P. but see 4 T. R. 511.

<sup>3</sup> Bul. Ni. Pri. 179.

<sup>4</sup> 2 Bur. 1024.

<sup>5</sup> 1 Blac. Rep. 394. Cowp.

56. 6 T. R. 488.

<sup>6</sup> 2 Bur. 820.

<sup>7</sup> 2 T. R. 32.

<sup>8</sup> 3 T. R. 188. *in notis.*

ations,

ations<sup>a</sup>, or if given in evidence, on a notice of set-off, it may be objected to at the trial<sup>o</sup>.

The debts sued for, and intended to be set off, must be *mutual*, and due in the same right: therefore a joint debt cannot be set against a separate demand, nor a separate debt against a joint one; but a debt due to a defendant, as surviving partner, may be set off against a demand on him in his own right<sup>p</sup>, and *vice versa*<sup>q</sup>. In an action of debt against a man on his own bond, he cannot set off a debt due to him in right of his wife<sup>r</sup>. Neither, for the same reason, can a defendant, sued as executor or administrator, set off a debt due to himself personally; nor, if sued for his own debt, can he set off what is due to him as executor or administrator. But where an action is brought by or against a *trustee*, a set-off may be made, of money due to or from the *cestuy que trust*<sup>s</sup>. It was formerly holden, that a set-off could not be allowed, as against the assignees of a bankrupt<sup>t</sup>; but it has since been determined, that in an action at their suit, the defendant may set off a

<sup>a</sup> 2 Str. 1271.

<sup>o</sup> Bul. Ni. Pri. 180.

<sup>p</sup> 5 T. R. 493.

<sup>q</sup> 6 T. R. 582. and see

<sup>r</sup> T. R. 476.

<sup>s</sup> Bul. Ni. Pri. 179.

<sup>t</sup> 1 T. R. 622.

<sup>u</sup> 1 Will. 155.

debt due to him, at the time of the bankruptcy<sup>u</sup>; but a note indorsed to him afterwards, cannot be set off<sup>v</sup>; nor cash-notes issued by the bankrupt before his bankruptcy, and payable to bearer, unless the defendant shew further, that such notes came to his hands before the bankruptcy<sup>w</sup>.

Where either of the debts accrues by reason of a *penalty*, the debt intended to be set off must be pleaded in bar; and the defendant in his plea, must aver what is really due<sup>x</sup>, which averment has been held to be traversable<sup>y</sup>, though laid under a *videlicet*<sup>z</sup>: But in all other cases, the defendant may either plead or give notice of set-off, at his election<sup>a</sup>. If at the time of the action brought, a larger sum was due from the plaintiff to the defendant, than from him to the plaintiff, the action being barred, it seems more proper to plead the set-off; and it is usually pleaded in country causes, to save the trouble and expence of proving the service of a notice. But where the sum intended to be set off is less

<sup>u</sup> Cowp. 133. and see the  
stat. 5 Geo. II. c. 30. § 28.

<sup>v</sup> 2 Str. 1234.

<sup>w</sup> 6 T. R. 57.

<sup>x</sup> Stat. 8 Geo. II. c. 24. § 5.

<sup>y</sup> 3 T. R. 65.

<sup>z</sup> 6 T. R. 460.

<sup>a</sup> 2 Bur. 1231. Bul. Ni.  
Pri. 179.

than

than that for which the action is brought, a notice of set-off should be given <sup>b</sup>.

The notice of set-off should regularly be given with, or at the time of pleading the general issue <sup>c</sup>: Though if it be not then given, the court, on motion, will give the defendant leave to withdraw the general issue, and plead it again with a notice of set-off <sup>d</sup>; and such notice may be given with the general issue, after the defendant has been ruled to abide by his plea <sup>e</sup>. In point of form, a notice of set-off should be almost as certain as a declaration; therefore where the notice of set-off was in these words, "Take notice that you are indebted to me, for the use and occupation of an house, for a long time held and enjoyed, and now lately elapsed;" it was deemed insufficient <sup>f</sup>; and it afterwards appearing, that the debt intended to have been set off was rent reserved on a lease by indenture, which was not mentioned in the notice, the Chief-Justice said it was bad on that account also; for if this had been shewn,

<sup>b</sup> Bul. *Ni. Pri.* 179.

<sup>c</sup> Append. Chap. XXVII.

<sup>d</sup> 2 Str. 1267.

<sup>e</sup> 1 T. R. 634. *in notis.*

<sup>f</sup> Bul. *Ni. Pri.* 179. But

note, this was before the stat.

11 Geo. II. c. 19. which gives the action for use and occupation.

the



the plaintiff might probably have proved an eviction, or some other matter to avoid the demand. The notice of set-off is usually written underneath the plea, and delivered therewith to the plaintiff's attorney; and a copy of the notice should be kept by the defendant's attorney, it being necessary to prove the delivery of it, at the trial of the cause<sup>2</sup>.

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Pleas are *single* or *double*; or in other words, the defendant may rely upon a single ground, or plead several matters in his defence. At common law, the defendant could only have pleaded a single matter to the whole declaration; which rigour often abridged the justice of his defence, and was doubtless one cause of perplexed in-artificial pleading; the party endeavouring to crowd as much reasoning as he could into his plea, however intricate, repugnant and contradictory he made it, by so doing<sup>1</sup>. But even at common law, the defendant might have pleaded several matters, to different parts of the declaration; as not guilty to part, and to other part a justification, or release, &c. And where there were several defendants, each of them might

<sup>1</sup> 1 Crompt. 160.

<sup>2</sup> 2 Eunom. 141.

have pleaded a single matter to the whole, or several matters to different parts of the declaration<sup>1</sup>. And now, by the statute for the amendment of the law<sup>2</sup>, "the defendant or tenant in any action or suit, or any plaintiff in replevin, in any court of record, may, with the leave of the same court, plead as many several matters thereto, as he shall think necessary for his defence: Provided nevertheless, that if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found, upon any issue in the said cause, for the plaintiff or demandant, costs shall be also given, in like manner; unless the judge who tried the said issue, shall certify that the said defendant or tenant, or plaintiff in replevin, had a probable cause to plead such matter, which upon the said issue shall be found against him. Provided also, that nothing in this act shall extend to any writ, declaration, or suit of appeal of felony, &c. or to any writ, bill, action, or information upon any penal statute<sup>1</sup>."

<sup>1</sup> Co. Lit. 303. a.

<sup>2</sup> Same statute, § 7.

<sup>3</sup> 4 Ann. c. 16. § 4, 5.

Upon

Upon this statute it has been holden, first, that the defendant shall not be allowed to plead *non assumpsit*<sup>m</sup>, or *non est factum*<sup>n</sup>, to the whole declaration, and a *tender* as to part; for one of these pleas goes to deny that the plaintiff ever had any cause of action, and the other partially admits it: secondly, that he shall not plead several matters, which require different trials, as in dower, *ne unques accouple en loyal matrimonie*, and a mortgage, or *ne unques seisie que dower*<sup>o</sup>; for the first matter is triable by the bishop, and the others by a jury, and if the former be found against the defendant, the judge cannot certify, that he had a probable cause of pleading it: thirdly, that the statute does not extend to any action, or information, upon a penal statute<sup>p</sup>. But subject to these exceptions, the defendant may plead as many different matters, as he shall think necessary for his defence, though they may appear to be contradictory or inconsistent; as *non assumpsit* and the

<sup>m</sup> 4 T. R. 194.<sup>n</sup> 5 T. R. 97.<sup>o</sup> Com. Rep. 148. 2 Blac. Rep. 1157, 1207. but see2 Wils. 118. *semb. contra.*<sup>p</sup> § 7, *ante*, 587. 1 Bar-nard. K. B. 17. *Caf. temp.*

Hardw. 262. 2 Str. 1044.

S. C. 4 T. R. 701. K. B.

Pr. Reg. 318. Barnes, 15,

353, 365. 2 Wils. 21. Pul.

&amp; Bos. 222. C. P.

statute

statute of limitations, or in trespass, not guilty, a justification, and accord and satisfaction, &c. So he may plead *non assumpsit* and infancy, or not guilty and *liberum tenementum*; though, as infancy may be given in evidence upon *non assumpsit*, and *liberum tenementum* upon not guilty, the pleading of these matters specially, seems to be unnecessary.

In order to plead two or more matters, it is not necessary that an affidavit should be made of the facts; but the court formerly expected to be informed, what the matters were, that were desired to be pleaded, in order to judge whether they were proper<sup>1</sup>; though now, the motion for leave to plead several matters is become a mere motion of course, which only requires a counsel's signature: And the motion-paper being delivered to the clerk of the rules, he will draw up a rule thereon, a copy of which should be delivered with the plea, if it be then ready; or otherwise the plaintiff's attorney should have notice, that instructions have been given for the rule, and that a copy will be delivered as soon as it is drawn up. If a double plea be filed, without a rule to plead several matters being drawn

<sup>1</sup> R. T. 5 & 6 Geo. II. (b).

up, or instructions given for it to the clerk of the rules, it is a nullity; and the plaintiff may sign judgment<sup>\*</sup>: But if a rule be obtained, and the plea put in, without saying by leave of the court, it is only an irregularity, or at most cause of special demurrer for duplicity<sup>\*</sup>.

Respecting costs, upon this statute, the intention of the legislature appears to have been, that if there be several matters pleaded, some of which are found for the plaintiff, he shall be entitled to the costs of those<sup>\*</sup>, notwithstanding other matters are found for the defendant, which entitle him to judgment upon the whole record; unless the judge before whom the cause was tried, shall certify that the defendant had a probable cause to plead the matters which are found against him. That this is the true construction of the statute, will appear from the following cases.

<sup>\*</sup> *Per Buller*, Just. in *Bedford and Gatfield*, H. 26 Geo. III. K. B.

<sup>\*</sup> 1 Will. 219.

<sup>\*</sup> In *Sayer's Law of Costs*, p. 223. it is said, he shall have the costs not only of *those* matters, but also of the *others*,

notwithstanding they are found for the defendant. But this seems to be a mistake; for the defendant, being entitled to judgment upon the matters found for him, is consequently entitled to the costs of them.

In



In trespass, the defendant pleaded not guilty and several justifications; upon the trial, the plaintiff not proving his possession of the *locus in quo*, the defendant had a verdict; and, by direction of *Denison J.* the verdict was entered upon the general issue only; upon which there was a motion for a *venire de novo*: but the court refused the motion, saying, the verdict was complete, and determined the cause; that the plaintiff was not entitled to damages, though, they said, he might have insisted to have a verdict entered on the other issues, for the sake of costs, which he would be entitled to, unless the judge certified, that the defendant had probable cause to plead such plea\*. But where the defendant, in trespass, pleaded three different justifications, to three different counts, and on issue joined, had a verdict for him on two, and against him on the third; on motion, this was holden not to be a case within the act, and that the plaintiff was entitled to costs at common law, on the whole declaration†.

Where the defendant pleads not guilty, and a justification to which the plaintiff demurs, and the plaintiff has judgment on the demurrer, but

\* *Bul. Ni. Pri.* 335.

† *Id. ibid.* but note, this was in the Common Pleas.

is nonsuited on the plea of not guilty, he shall nevertheless be allowed the costs of the demurrer, which shall be deducted out of the costs allowed to the defendant <sup>v</sup>. And if one of several pleas, pleaded by defendant, be adjudged bad, on a demurrer to plaintiff's replication, the plaintiff is entitled to have the costs of those pleadings deducted, from the costs taxed for the defendant upon the *postea*, if afterwards, upon the trial of the issues joined on the other pleas, the defendant should have a verdict; even though it should appear, on the whole of the record, that the plaintiff had no cause of action <sup>x</sup>. But if the plaintiff take issue on several pleas, one of which is insufficient in law, and has a verdict on all the issues, except that joined on the insufficient plea, which is found for the defendant, and afterwards judgment is entered for the plaintiff, still he shall not be allowed any costs, upon the issue found for the defendant <sup>y</sup>. And it has been resolved, at a meeting of all the judges, that if there be a certificate upon the 43 *Eliz.* the plaintiff shall not have the costs of any plea, pleaded with leave of the court; although the issue thereupon joined be found for him, and the judge have not cer-

<sup>v</sup> Barnes, 136.

<sup>x</sup> 2 T. R. 391.

<sup>y</sup> 1 T. R. 266. but see Barnes, 133.

tified,

tified, that the defendant had a probable cause for pleading the matter therein pleaded<sup>a</sup>.

In an action for criminal conversation, the defendant pleaded two pleas, *viz.* not guilty, and not guilty within *six* years; on the former, the plaintiff joined issue, and obtained a verdict, but to the latter there was a demurrer, and judgment against him; and it was holden, that the defendant should have the costs of the demurrer, but upon the trial, there should be no costs on either side<sup>a</sup>.

The *avowant* or defendant in replevin, though not within the words, is plainly within the meaning, of the statute 4 *Ann.* c. 16. And accordingly, where some issues in replevin are found for the plaintiff, which entitle him to judgment, and some for the defendant, the latter must be allowed the costs of the issues found for him, out of the general costs of the verdict; unless the judge certify, that the plaintiff had a probable cause for pleading the matters, on which those issues are joined<sup>b</sup>: And the general rule is said

<sup>a</sup> Say. Rep. 260.

<sup>a</sup> 2 Bū. 753. 2 Will. 85. Say. Costs, 221. S. C. The authority of this case seems to be questionable, as to the costs of the trial, from a similar one that was differ-

ently determined, in the court of Common Pleas, (Barnes, 141.) as well as from the reasoning that prevailed in several of the foregoing cases. <sup>b</sup> 2 T. R. 235.

to be, that where several matters are pleaded by the plaintiff, some of which are found for him, and others for the defendant, so that the plaintiff is entitled to judgment; if the judge who tried the cause certify, that there was a probable cause for pleading those pleas, the master is not to deduct the costs of the issues so found for the defendant; but if there be no certificate, the defendant is entitled to have those costs deducted for him<sup>c</sup>.

The certificate of probable cause is not required to be made in court, at the trial of the cause<sup>d</sup>; and, where the judge refuses to grant it, the court have not a discretionary power, whether they will allow the defendant any costs at all; but are bound by the statute to allow him some costs, though the *quantum* is left to their discretion<sup>e</sup>.

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The general qualities and conditions of a plea are, first, that it be conformable to the count<sup>f</sup>; and, taken collectively, answer the whole decla-

<sup>c</sup> 2 T. R. 237. and see Banes, 141, 144, 146. Doug. 708, 9. *in notis, accord.*

<sup>d</sup> Barnes, 141.

<sup>e</sup> *Id.* 140. 2 T. R. 394, 5.

<sup>f</sup> Co. Lit. 303. a.

ration:

ration: for if any part of the declaration be left unanswered, it operates as a discontinuance. If a plea begin as an answer to the whole, but in truth the matter pleaded is only an answer to part, the whole plea is naught, and the plaintiff may demur; but if a plea begin only as an answer to part, and is in truth but an answer to part, it is a discontinuance, and the plaintiff must not demur, but take his judgment for the part unanswered, as by *nil dicit*; for if he demur, or plead over, the whole action is discontinued<sup>a</sup>. Secondly, the plea at common law should be *single*, consisting only of one fact, or of several facts making together one point: for if a plea contain duplicity, or alledge several distinct matters, which require several answers to the same thing, it is bad<sup>b</sup>. Thirdly, it should be *certain*<sup>c</sup>, in point of form, as well as substance: but certainty to a common intent is sufficient<sup>d</sup>; and that which is apparent to the court, by necessary collection out of the record, or is necessarily implied, need not be expressed<sup>e</sup>, as in setting forth the feoffment of a manor, it is

<sup>a</sup> 1 Salk. 179, 80. Gilb.  
C. P. 155, 157.

<sup>b</sup> Co. Lit. 304. a.

<sup>c</sup> *Id.* 303. a.

<sup>d</sup> *Id.* 303. b.

<sup>e</sup> *Id.* *ibid.*



unnecessary to state livery and attornment: So, that which is alleged by way of conveyance, or inducement to the substance of the matter, need not be so certainly alledged, as that which is the substance itself<sup>m</sup>. Fourthly, every plea, for the sake of certainty, must be *direct and positive*, and not by way of argument or rehearsal<sup>n</sup>. Fifthly, it should be so pleaded, as to be *capable of trial*, by the court upon demurrer or *nul tiel record*, or by the jury upon an issue in fact<sup>o</sup>. Sixthly, it should be *true*, and capable of proof; for truth is said to be the goodness and virtue of pleading, as certainty is the grace and beauty of it<sup>p</sup>. Seventhly, the plea shall be taken most strongly against him that pleadeth it, for every man is presumed to make the best of his own case<sup>q</sup>. But lastly, *surplusage* shall never make the plea vicious, except where it is repugnant, or contrary to matter precedent<sup>r</sup>.

In many cases, the law doth allow *general* pleading, for avoiding prolixity and tediousness; and the particulars shall come on the other side<sup>s</sup>.

<sup>m</sup> *Id.* 303. a.

<sup>q</sup> *Co. Lit.* 303. b.

<sup>n</sup> *Id. ibid.* & 304. a. Hob.

<sup>r</sup> *Id. ibid.* For the several cases that illustrate the above

295.

<sup>o</sup> *Co. Lit.* 303. b.

<sup>s</sup> *Co.* rules, see *Com. Dig.* tit.

24. 5. March, 207.

*Pleader*, (E.) &c.

<sup>p</sup> *Hob.* 295.

<sup>q</sup> *Co. Lit.* 303. b.

Thus,

Thus, when a man is bound to perform all the covenants in an indenture, if they are all in the affirmative, he may plead performance generally: but if any are in the negative, to so many he must plead specially, (for a negative cannot be performed,) and generally to the rest. So if any are in the disjunctive, he must shew which of them he hath performed<sup>1</sup>. And if any are to be done of record, he must shew the performance of those specially, and cannot involve them in general pleading. In setting forth a title, general estates in fee-simple may be generally alledged; but the commencement of estates-tail, and other particular estates, must regularly be shewn, unless in some cases, where they are alledged by way of inducement<sup>2</sup>: And the life of tenant in tail, or for life, ought to be averred<sup>3</sup>.

Every plea ought to have its proper conclusion<sup>4</sup>: When the general issue is pleaded, or the defendant simply denies some material fact alledged in the declaration, he should conclude his plea, by putting himself upon the country; but where the plea advances new matter, in the affirmative, the defendant should conclude it with

<sup>1</sup> Co. Lit. 303. b.

<sup>2</sup> *Id. ibid.*

<sup>3</sup> *Id. ibid. ante, 357, 8.*

<sup>4</sup> *Id. ibid.*

an averment, or verification and prayer of judgment *si actio*; or, in other words, by professing himself ready to verify the plea, and praying judgment, if the plaintiff ought to have or maintain his action against him. An *avowry* however, wherein the defendant is an actor, and which is in the nature of a count, need not be averred<sup>\*</sup>; nor pleas which are merely in the *negative*, because a negative cannot be proved. Where a judgment, or other matter of record, is pleaded, the plea should conclude with a verification *by the record*: And where in debt, the matter of the plea shews there never was a good cause of action, as in debt on bond against an heir, who pleads *riens per dissent*, the defendant, instead of concluding that the plaintiff ought not to have his action, may conclude that he (the defendant) ought not to be charged with the debt, by virtue of the writing obligatory<sup>†</sup>. In an action of *debt*, the defendant, in pleading a tender, ought to conclude his plea, by praying judgment if the plaintiff ought to have or maintain his action, to recover *any* damages against him; for in this action, the debt is the principal, and the damages are only accessory: but in *assumpsit*, the damages are the principal; and

<sup>\*</sup> Co. Lit. 303. 2.

<sup>†</sup> 2 Salk. 516.

there-

therefore, in pleading a tender, the defendant ought to conclude his plea, with a prayer of judgment, if the plaintiff ought to have or maintain his action, to recover any *more* or *greater* damages than the sum tendered, or *any* damages by reason of the non-payment thereof<sup>2</sup>. In pleading matter of estoppel, the defendant in his conclusion ought to rely upon it<sup>3</sup>.

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The general issue is engrossed on treble-penny stamped paper, and delivered to the plaintiff's attorney, or entered in the general issue-book, kept by the clerk of the judgments<sup>4</sup>; and it need not be signed by counsel. There are also certain *common* pleas, that need not be signed or filed, but may be delivered to the plaintiff's attorney; such as *plene administravit*, bankruptcy in the defendant<sup>5</sup>, a special *non est factum*, *solvit ad diem*<sup>6</sup>, *comperuit ad diem* to a bail bond, or *nul tiel record* to an action on a judgment or re-

<sup>2</sup> 2 Salk. 622, 3. 1 Ld. Raym. 254. S. C.

<sup>3</sup> Co. Lit. 303. b.

<sup>4</sup> R. T. 5 & 6 Geo. II. (b).

<sup>5</sup> 6 T. R. 496.

<sup>6</sup> 5 T. R. 661. In this case, it was determined, that

the plea of *solvit ad diem* should be delivered to the plaintiff's attorney, and not entered in the general issue book, or filed with the clerk of the papers.

cognizance;

cognizance; in covenant, when the plea concludes to the country; and in trespass, *son assault demesne*, *liberum tenementum*, or not guilty to a new assignment. All pleas and demurrers upon writs of error, *scire facias*, and *audita querela*, ought also to be delivered<sup>c</sup>. But except in the foregoing cases, all special pleas must be signed by counsel<sup>f</sup>, and filed in the office of the clerk of the papers<sup>g</sup>, who makes copies of them, if required, for the plaintiff's attorney.

The defendant cannot commonly *waive* the general issue, or a general demurrer, and instead thereof give a special plea or demurrer<sup>h</sup>: but it is said, that if the general issue be not entered, the defendant may waive it, and plead specially, without leave of the court, in four days<sup>i</sup>; or, as it should seem, before the adjournment day of the term<sup>k</sup>, or within the first five days of the ensuing term<sup>l</sup>; and even afterwards, where it is not to the prejudice or delay

<sup>c</sup> R. T. 12 W. III. (a). K. B. 255.

<sup>f</sup> R. E. 18 Car. II.

<sup>1</sup> 1 Ld. Raym. 674. 3 Salk.

<sup>g</sup> R. T. 2 Jac. I. R. T. 211, 274. S. C.

16 Car. II. R. M. 2 W. & M. <sup>k</sup> Say. Rep. 87.

<sup>h</sup> R. T. 5 & 6 Geo. II. (b). <sup>1</sup> *Prax. utr. banci*, 37. R.

<sup>1</sup> Wilf. 29. *in marg.* Rich. T. 5 & 6 Geo. II. (b).



of the plaintiff, the defendant, by leave of the court, may withdraw the general issue, in order to plead specially<sup>m</sup>, or in order to plead it again, with a notice of set-off<sup>n</sup>, or upon bringing money into court<sup>o</sup>.

If a special plea, or special demurrer, be put in, and the book is made up, and delivered to the defendant's attorney, he may, by the ancient practice of the court, strike out the special plea or demurrer, and return it with the general issue, or a general demurrer<sup>p</sup>. To prevent this, if the defendant plead a dilatory or frivolous plea, the court in term-time, or a judge in vacation<sup>q</sup>, will order him to abide by it, or plead some other plea, peremptorily, on the morrow; or, if it be towards the end of the term, (that the plaintiff may have sufficient time to give notice of trial) the court will order the defendant, if he will not abide by his plea, to plead another *instantly*, provided always that the time allowed by the common rule to plead be expired<sup>r</sup>:

<sup>m</sup> 2 Str. 906, 1181. 1 P 2 Salk. 515. R. T. 5 & 6  
 Wils. 177, 254. 1 Blac. Rep. Geo. II. (b). 1 Wils. 29.  
 357. 2 Wils. 204. 1 2 Bur. 781.  
<sup>n</sup> 2 Str. 1267. 1 2 Salk. 515. R. T. 5 & 6  
<sup>o</sup> *Id.* 1271. 1 Wils. 254. Geo. II. (b).  
 S. C. cited.

And

And the practice is the same, with regard to frivolous demurrers \*.

When the defendant is ruled to abide by his plea, he either abides by it †, or pleads another: In the former case, he may afterwards demur to the plaintiff's replication ‡; in the latter, he can only plead the general issue §, to which however he may add a notice of set-off ¶. And, whether he be ruled to abide by his plea or not, it is a general rule, that the defendant cannot waive a special plea, or special demurrer, but in order to plead the general issue †; though leave has been given under circumstances, for the defendant to *add* a plea after issue joined, and even after two terms have elapsed since he first pleaded §.

\* 2 Salk. 515. R. T. 5 & 6  
Geo. II. (b).

† 2 Str. 1234.

‡ *Id.* 1185.

¶ 1 T. R. 693.

§ *Id.* 694. *in notis.*

‡ 2 Str. 960. 1 Willf. 29.

§ 1 Willf. 223.



